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TENNESSEE. — (85) **4**; (86) **6**; (87) **10**; (88) **17**; (89) **24**; (90) **25**; (91) **30**; (92) **36**; (93) **42**; (94) **45**; (95) **49**; (96) **54**; (97) **56**; (98) **60**; (99) **63**; (100) **66**; (101) **70**; (102) **73**; (103) **76**; (104) **78**.

TEXAS. — (68) **2**; (69, 24 Tex. App.) **5**; (70, 25, 26 Tex. App.) **8**; (71) **10**; (27 Tex. App.) **11**; (72) **13**; (73, 74) **15**; (75) **16**; (76) **18**; (77, 28 Tex. App.) **19**; (78) **22**; (79) **23**; (29 Tex. App.) **25**; (80, 81) **26**; (82) **27**; (30 Tex. App.) **28**; (83) **29**; (84) **31**; (85) **34**; (31 Tex. Cr. Rep.; 86) **37**; (86; 32 Tex. Cr. Rep.) **40**; (87; 33 Tex. Cr. Rep.) **47**; (34 Tex. Cr. Rep.; 88) **53**; (89, 90) **59**; (35 Tex. Cr. Rep.) **60**; (36 Tex. Cr. Rep.) **61**; (91; 37 Tex. Cr. Rep.) **66**; (38 Tex. Cr. Rep.) **70**; (92) **71**; (39 Tex. Cr. Rep.) **73**; (40 Tex. Cr. Rep.) **76**; (93) **77**.

UTAH.—(13) **57**; (14) **60**; (15) **62**; (16) **67**; (17) **70**; (18) **72**; (19) **75**; (20) **77**.

VERMONT.—(60) **6**; (61) **15**; (62) **22**; (63) **25**; (64) **33**; (65) **36**; (66) **44**; (67) **48**; (68) **54**; (69) **60**; (70) **67**; (71) **76**.

VIRGINIA.—(82) **3**; (83) **5**; (84) **10**; (85) **17**; (86) **19**; (87) **24**; (88) **29**; (89) **37**; (90) **44**; (91) **50**; (92) **53**; (93) **57**; (94, 95) **64**; (96) **70**; (97) **75**.

WASHINGTON.—(1) **22**; (2) **26**; (3) **28**; (4) **31**; (5) **34**; (6) **36**; (7) **38**; (8) **40**; (9) **43**; (10) **45**; (11) **48**; (12) **50**; (13) **52**; (14) **53**; (15) **55**; (16) **58**; (17) **61**; (18) **63**; (19) **67**; (20) **72**; (21) **75**; (22) **79**.

WEST VIRGINIA.—(29) **6**; (30) **8**; (31) **13**; (32, 33) **25**; (34) **26**; (35) **29**; (36) **32**; (37) **38**; (38, 39) **45**; (40) **52**; (41) **56**; (42) **57**; (43) **64**; (44) **67**; (45) **72**; (46) **76**.

WISCONSIN.—(69) **2**; (70, 71) **5**; (72) **7**; (73) **9**; (74, 75) **17**; (76, 77) **20**; (78) **23**; (79) **24**; (80) **27**; (81) **29**; (82) **33**; (83) **35**; (84) **36**; (85, 86) **39**; (87) **41**; (88) **43**; (89) **46**; (90) **48**; (91) **51**; (92) **53**; (93) **57**; (94) **59**; (95) **60**; (96, 97) **65**; (98, 99) **67**; (100) **69**; (101) **70**; (102) **72**; (103) **74**; (104, 105) **76**.

WYOMING.—(3) **31**; (4) **62**; (5) **63**; (6) **71**; (7) **75**.

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CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

REYNOLDS v. LONDON AND LANCASTER FIRE INSURANCE COMPANY.

[128 Cal. 16, 60 Pac. 467.]

INSURANCE ON MORTGAGED BUILDINGS—INTEREST OF MORTGAGEE—EXTINGUISHMENT OF DEBT.—Where a mortgagor insures the mortgaged buildings as further security for the indebtedness, a stipulation in the policy for payment to the mortgagee in case of loss does not substitute the mortgagee for the mortgagor as the party insured; the mortgagee has an interest in the policy only as security for his debt, and such interest ceases whenever the debt is discharged.

INSURANCE—MORTGAGED PROPERTY PURCHASED UNDER FORECLOSURE—EXTINGUISHMENT OF DEBT.—The purchase of mortgaged premises by a mortgagee under foreclosure proceedings for the full amount of the judgment extinguishes the debt, and such purchaser is no longer a creditor or mortgagee. Hence he has no further interest in an insurance policy taken by the mortgagor, in which his interest was only as security for his debt.

MORTGAGE FORECLOSURE—EXTINGUISHMENT OF DEBT.—While a foreclosure does not extinguish a mortgagor's equity of redemption until after the expiration of the statutory period for redemption, yet it does pass a defeasible title which may become absolute, and the sale to the mortgagee for the full amount of the mortgage debt operates as an extinguishment thereof.

INSURANCE—LOSS AFTER FORECLOSURE AND BEFORE REDEMPTION—PAYMENT TO MORTGAGEE.—The fact that an insurance loss has been paid to a mortgagor during the period of redemption does not render the insurance company liable to the mortgagee, where his interest in the policy has ceased with the extinguishment of the mortgage indebtedness.

Van Ness & Redman, for the appellant.

J. C. Christy and Henry W. Nisbet, for the respondent.

¹⁸ McFARLAND, J. Action upon a fire insurance policy. A demurrer to the complaint having been overruled, defendant answered; and thereupon, on motion of plaintiff, judgment was rendered for him on the pleadings. Defendant, the insurance company, appealed from the judgment. The defendant W. R. Porter made default, and does not appeal.

It appears from the pleadings that the policy in question was issued to said Porter upon certain buildings on his land, including a dwelling-house which was insured for seven hundred and fifty dollars, and also upon certain personal property. Porter procured the policy and paid the premium. At the date of the policy the plaintiff had a mortgage on the land on which the building stood to secure an indebtedness to him from Porter; and it is averred in the complaint "that, as a further security for said indebtedness," Porter caused to be written on the policy the following: "Loss, if any, payable to M. D. Reynolds, on buildings only." Plaintiff commenced an action against Porter to foreclose the mortgage, and on August 1, 1896, obtained a decree of foreclosure and order of sale; and on September 5, 1896, the premises were sold under the foreclosure proceedings to plaintiff for fifteen hundred and fifty dollars—that being the full amount due, including interest and costs. On March 9, 1897, the period for redemption having expired without redemption, plaintiff received his deed under the sale. On November 5, 1896, which was after the purchase by plaintiff under the foreclosure proceeding but before the expiration of the period for redemption, the dwelling-house was destroyed by fire. It is averred in the complaint that Porter furnished proofs of loss, and performed all the conditions of the policy required of him. It further appears that the defendant has paid to Porter all loss and damage sustained by him from the destruction of the dwelling-house. The question to be determined is whether or not, under these circumstances, the defendant is legally liable to plaintiff in any amount whatever ¹⁹ upon the alleged cause of action sued on; and in our opinion there is no such liability.

It is apparent, not only from the averments in the complaint but also from the general law on the subject, that plaintiff's relation to the policy was merely that of a creditor of Porter, who was the party insured; that the only interest which he had therein grew out of, and was dependent upon, the indebtedness from Porter to him, and that he was named in the policy merely that the latter might be—as averred in the complaint—"a fur-

ther security for said indebtedness." Section 2541 of the Civil Code provides that: "Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor"; and in *Holbrook v. Baloise Ins. Co.*, 117 Cal. 566, 49 Pac. 555, this court said that: "The stipulation in the policy for payment to the mortgagees in case of loss was but a provisional assignment of the contingent proceeds of the contract, and had not the effect to substitute the mortgagees for the mortgagor as the party insured." Therefore, in such a case, as the mortgagee has an interest in the policy only as security for his debt, it follows that such interest ceases whenever the debt is discharged, and there is no longer the relation of creditor and debtor between him and the mortgagor. In *Phoenix Assur. Co. v. Allison*, 27 S. W. 784, the court of civil appeals of Texas said: "So it appears that in either case—whether the mortgagee procures the policy, paying the premium, without authority from the mortgagor, or whether it is procured by the mortgagor in the name of the mortgagee and the debt is paid—the insurers are not liable to the mortgagee, because in the one case the payment of the debt and the extinguishment of the mortgage determines all efficacy in the policy, and in the other the mortgagor, paying the debt, is subrogated, and he alone should sue": See, also, *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. 495. In the case at bar, if Porter had extinguished the mortgage debt by paying it, no one would claim that there was any cause of action left to plaintiff against the defendant upon the policy in question. But by the foreclosure proceedings and the purchase of the mortgaged premises by the plaintiff for the ²⁰ full amount of the debt and judgment, the debt was fully extinguished, and plaintiff was no longer a creditor or mortgagee of Porter. There was no longer any debt which could be enforced in any way. Plaintiff was then substantially the owner of the property; and Porter had the mere statutory right of redemption, which could be exercised within the statutory period, not by paying the former and extinct debt, but by paying the purchase price bid for the property, together with certain statutory percentages and costs. In *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66, this court said: "Although the right of a mortgagor to redeem the mortgaged premises is not cut off until the expiration of the time allowed for redemption, yet the purchaser at a sale under the judgment rendered in the

foreclosure suit acquires the same interest in the property sold as does a purchaser in property sold under an ordinary money judgment. 'Upon the sale the purchaser acquires all the right, title, interest, and claim of the debtor thereto' (Code Civ. Proc., sec. 700), and only the right to redeem from this sale is left in the mortgagor. If a redemption is made by the mortgagor, it is not from the lien of the mortgage, but from the sale under the judgment, and the amount which he is required to pay under such redemption is not the amount of the mortgage, but the amount for which the property was sold. Prior to the entry of the judgment the mortgagor holds the title to the property subject to the lien of the mortgage, and after the judgment is entered he holds it subject to the lien of the judgment; but after the sale he has only a right of redemption, while the purchaser has the entire beneficial interest in the property, subject to be defeated by a redemption from the sale. "The execution of the deed gives to the purchaser at the sale no new title to the land purchased by him, but is merely evidence that his title has become absolute": *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 120. "The purchaser obtains an inchoate right which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land had already been satisfied by the sale to the extent of the amount bid and paid by the purchaser. The purchaser has already bought the land and paid for it. The sale is simply a ²¹ conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time, the right to a conveyance becomes absolute without any further sale or other act to be performed by anybody": *Page v. Rogers*, 31 Cal. 301." In *Breedlove v. Norwich etc. Ins. Soc.*, 124 Cal. 166, 56 Pac. 770, this court said: "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto. . . . It is by the foreclosure sale that the title passes: *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 120." The sheriff's deed gives no new title. It is merely evidence that the title has become absolute: *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66. Under these authorities there is no logical answer to the proposition that the sale to plaintiff extinguished the mortgage indebtedness and all interest which he had in the

policy as "a further security for said indebtedness." Respondent cites *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509. The facts in that case differ to some extent from those in the case at bar, although there are some things in the opinion which support respondent's contention; but, so far as the opinion there could be invoked to sustain the judgment in the case at bar, it is founded upon notions of the effect of a judicial sale which are inconsistent with those declared in the later cases of *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 120, *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66, and *Breedlove v. Norwich etc. Ins. Soc.*, 124 Cal. 166, 56 Pac. 770, above cited. Of course, a foreclosure, in the sense of a perfect extinguishment of the mortgagor's equity of redemption, may be said not to be complete until after the expiration of the statutory period for redemption; but that consideration has no bearing upon the proposition that the sale extinguishes the debt. As before stated, redemption is effected, not by the payment of the former debt, which no longer exists, but by payment of the purchase price at the judicial sale, which may be much less or much more than the former debt. We are not concerned with the question whether or not, under the circumstances, Porter could have recovered anything of defendant on the policy; although, if Porter suffered no loss, then certainly plaintiff could not have recovered, because Porter was the party insured and only through his losses could plaintiff's security have been efficacious. Neither ²² are we concerned with the class of cases where the mortgagee himself procures a policy on buildings situated on the mortgaged premises, where he is the party insured, and where it has been held that he may take the policy on his interest in the property itself. In the case at bar, under our law, the plaintiff was not the party insured, and his interest in the buildings mortgaged was not insured; the interest in the property which was insured was that of Porter the mortgagor, and it was only the indebtedness of Porter to plaintiff which gave the latter any interest in the policy. After he changed his position from creditor to purchaser he could, in the latter capacity, have procured a policy on the buildings and thus insured his interest in the property itself; but whatever interest he had in the old policy ceased with the extinguishment of the indebtedness.

The judgment appealed from is reversed.

Temple, J., Henshaw, J., Harrison, J., Garoutte, J., and Van Dyke, J., concurred.

Rehearing denied.

INSURANCE ON MORTGAGED PREMISES.—If a mortgagor procures a policy of insurance on the property to be issued to himself, loss payable to the mortgagee, the former is the assured: See the monographic note to *King v. State etc. Ins. Co.*, 54 Am. Dec. 700. See this note, pages 693-700, for a general discussion of the rights of the mortgagee under an insurance policy. A mortgagee is still protected by a policy made payable to him, though he has foreclosed the mortgage and purchased the property at the sale, if the mortgagor retains the right to redeem: *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509.

HINES v. GOOD.

[128 Cal. 38, 60 Pac. 527.]

REPLEVIN.—THE TITLE TO REAL ESTATE cannot be litigated in an action of replevin.

REPLEVIN—TITLE TO LAND—SALE OF HOUSE BY ONE IN ADVERSE POSSESSION.—Where a defendant, who is in the actual possession of land in good faith, claiming title thereto, sells a house thereon which is severed from the land and removed by the vendee, one out of possession cannot, in an action of replevin, secure possession of such house upon the claim that he is the true owner of the land.

REPLEVIN—TITLE TO LAND—JUDGMENT-ROLLS AS EVIDENCE.—In an action of replevin for the recovery of a house, judgment-rolls are admissible in evidence where they are not offered for the purpose of establishing title, but solely to show that the defendant claimed title to the land upon which the house was situated, and which are pertinent for that purpose.

L. L. Cory and Stanton L. Carter, for the appellant.

George B. Graham, for the respondents.

39 GAROUTTE, J. Plaintiff claimed to be the owner of a certain piece of land upon which was situated a house. Defendant Mrs. Sarah Foulke was in the possession of the property, also claiming title thereto. She sold a portion of the house to defendant Good, it being at that time a part of the real estate. The house was severed from the land and removed to other premises. Whereupon plaintiff brings this action in replevin to recover possession of the house, claiming title thereto by virtue of his title to the land.

The trial court made findings of fact, to the effect that defendant Sarah Foulke "was in the actual possession and occupancy ⁴⁰ of all of the premises and property described in plaintiff's complaint, and residing thereon together with her husband and family. That at all times herein mentioned said defendant Sarah I. Foulke claimed title in good faith to the whole of said premises. . . . That on, to wit, August 1, 1896, and at all times from thence hitherto, said Sarah I. Foulke was and has been in the actual possession of the whole of the premises and property described in plaintiff's complaint, claiming title thereto in good faith. . . . That at the time of the sale and delivery of the portion of said dwelling-house as aforesaid, said Sarah I. Foulke was in the actual possession thereof, but not after such delivery. That on, to wit, the date last aforesaid, in good faith and for a valuable consideration, she sold and delivered said portion of said dwelling-house described in plaintiff's complaint to defendant Robert E. L. Good, and on, to wit, August 9, 1896, said Good took and removed the same from and off the premises described in said complaint." The court also found that defendant Foulke had filed a homestead upon the property. But, as we view the case, this homestead finding becomes immaterial.

The court, upon the aforesaid findings of fact and others not necessary to detail, rendered judgment for defendants, having made no finding as to the status of the legal title to the land. The evidence is sufficient to support the finding as to the actual possession of defendant Sarah Foulke and her claim of title in good faith, and upon this state of facts the question is at once presented, Do these findings support the judgment? We are satisfied that they do. The title to this real estate cannot be litigated in an action of claim and delivery. Where a defendant is in the actual possession of real estate in good faith, claiming title thereto, a party, upon the claim that he is the true owner of the real estate, may not by claim and delivery secure the possession of property severed by defendant from the land. And this principle of law is based upon the ground that the title to the land cannot be litigated in that kind of an action. The cases all look in this direction, and the citation of a single one is all that is necessary: *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663. In that case it is said: "The cases go to the point that, where the property sued for has ⁴¹ been severed from plaintiff's land, he can show his ownership of the chattel by showing his ownership of the land, unless the

defendant has, and had when the property was severed from the freehold, adverse possession of the land, claiming title thereto. Of course, to exclude plaintiff's right to sue for the personal property, defendant must have the adverse possession, claiming title." The evidence all shows that the claim of title upon the part of defendant Sarah was adverse to plaintiff, and a fair construction of the aforesaid findings so indicates. Under these circumstances, plaintiff's cause of action must fail, and it becomes unnecessary to test the character of plaintiff's title, or even the validity and effect of defendant Sarah's homestead.

Appellant discusses various assignments of error bearing upon the admission of evidence. Many of these assignments refer to matters pertaining to plaintiff's title, and others relate to defendant Foulke's homestead. As we have seen, those matters are immaterial; especially so, in view of the findings of fact as to plaintiff Foulke's actual possession and bona fide claim of title. The judgment-rolls introduced in evidence were not offered for the purpose of establishing title in either plaintiff or defendant, but were offered alone to show that defendant Foulke during all these times claimed title to the land upon which this house was situated; and for that purpose the evidence was pertinent. Many of the assignments bear upon evidence which appears to be wholly immaterial to the case from any standpoint.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

REPLEVIN.—TITLE TO LAND cannot be tried in replevin, except incidentally: See the monographic note to *King v. Mason*, 89 Am. Dec. 429, 430; *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 318. No action lies to recover grain sown and harvested by one on lands to which he claimed title, and of which he was in actual and adverse possession: *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663.

DONOVAN v. FERRIS.

[128 Cal. 48, 60 Pac. 519.]

MASTER AND SERVANT—FELLOW-SERVANT OR VICE-PRINCIPAL.—A foreman of a stone quarry, whose duty it is to warn servants working in one tunnel to leave their work before a blast in an adjoining tunnel is fired, is a fellow-servant and not a vice-principal of one who is injured by reason of his failure to give such warning, since both are employed by the same employer in the same general business.

MASTER AND SERVANT—LIABILITY OF MASTER FOR FOREMAN'S NEGLIGENCE.—A master is not liable for an injury to a servant due to the negligence of his foreman, where both servants are employed in the same general business, unless he has failed to use ordinary care in the selection of such foreman.

MASTER AND SERVANT—BLASTING—DUTY TO GIVE WARNING.—It is not a duty personal to a master to give warning of danger to those employed in the business of blasting, and his liability ceases when he has employed a competent person to give such warning.

MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE TO WORK AND SUITABLE MACHINERY.—It is the duty of an employer to furnish his employé suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provision for the safety of the employés as will reasonably protect them from the dangers incident to their employment.

MASTER AND SERVANT—EVIDENCE—CROSS-EXAMINATION.—Where a foreman upon his direct examination testifies that he was employed by and was under the direction of a superintendent, it is not error as calling for the conclusion of the witness to ask him on cross-examination whether the superintendent had authority to direct him, since if he was employed by the superintendent it followed, as a matter of law, that the superintendent had authority to direct him.

Reddy, Campbell & Metson, for the appellant.

Van Ness & Redman, for the respondent.

50 COOPER, C. Action to recover damages for personal injuries. After the plaintiff introduced his evidence, a nonsuit was granted and judgment accordingly entered. This appeal is from the judgment and from an order denying the defendant's motion for a new trial. The evidence shows the facts to be substantially as follows: The defendant was the owner of a stone quarry in the city and county of San Francisco, in which he had been for several months carrying on the business of blasting. In this business he employed a large number of laborers and a

superintendent, but the blasting operations were carried on under the direct supervision of one Howes as foreman. On the morning of the 30th of November, 1895, the plaintiff was, and for several months prior thereto had been, in the employ of defendant as a laborer in the quarry, under the directions of said Howes as foreman. Three parallel tunnels had been driven from the face of the quarry into the hill fifty or sixty feet apart, and a distance of about thirty feet. These tunnels were designated at the trial as tunnels No. 1, No. 2, and No. 3. Tunnels No. 2 and No. 3 had each been charged with several hundred pounds of Judson powder, preparatory to setting off a blast, and were ready to fire on said morning. For several days immediately preceding the plaintiff had been working in tunnel No. 1, and that morning had been directed by Howes, the foreman, to drive a cross-cut from the inner end of the tunnel to make a ⁵¹ pocket for powder. He entered the tunnel with three other men and began work about 7 o'clock A. M. Blasting was the business in which plaintiff was employed, and for which defendant hired him. A great many blasts had been fired during the time plaintiff was so employed. The foreman, Howes, had always on previous occasions given the men in the tunnels sufficient warning. He would call to them, "Going to fire; get out." The men in the tunnels, prior to this time, were always given plenty of time to get out. The tunnel in which they were working was a safe place in which to work except during the time of firing blasts in the other tunnels. One Davidson was the superintendent of defendant, and as such superintendent employed Howes, who, as foreman, had full charge of the blasting. Howes usually gave a general order to all the men to get out of the tunnels during the time a blast was being fired. He sometimes would go personally, and sometimes he would send others and warn the men to get out. This system of warning had always been found efficient prior to the day of the injury to plaintiff. When plaintiff entered the tunnel he was required by Howes to continue work until called out, and had no means of knowing when a blast was to be fired unless warned by some one. Howes knew that plaintiff and the three other men were in the tunnel, and told some one to see that they were out before the blast was fired. Howes thought they had been warned to get out, and gave the order to fire without knowing whether they had been called out or not. He could see the mouth of the tunnel from where he stood, but did not look to see if the men had left the tunnel. It was the rule and custom, established by Howes, to

know that warning had been given and heard, and time allowed to reach a place of safety before giving the order to fire the blast. When the order to fire was given, both tunnels No. 2 and No. 3 were exploded simultaneously, and by the force of the explosion the seams in the rock lying between tunnels Nos. 1 and 2 were opened to such an extent that the gases caused by the explosion of the powder passed through said seams and fissures into tunnel No. 1. The force of the explosion caused the rock and loose earth lying around the mouth of the tunnel to fall in and close it, thus preventing the gases from escaping and ⁵² the fresh air from entering, in consequence of which, before the mouth of the tunnel could be opened, one man had died and the other three were taken out insensible. One of those died shortly afterward but plaintiff and one Link recovered. The plaintiff was injured, confined to his bed for several days, and has incurred expenses for doctor's bills and care. It is plain from the foregoing statement of facts that the plaintiff has been damaged and that his damage has been caused by negligence. It is also apparent that the negligence consisted in the failure of Howes to give warning to plaintiff to leave the tunnel in which he was at work before the blast was fired. It is not claimed that the plaintiff as in any way at fault. He knew the dangerous nature of the business in which he was employed, and relied upon Howes to notify him before firing the blast. There is no claim made that defendant did not use proper care in the selection of Howes as foreman, neither is it claimed that he was unfit or incompetent for the business in which he was engaged. It will be necessary, then, to determine from these facts whether or not the defendant is liable. Was Howes a fellow-servant of plaintiff? Thompson on Negligence, volume 2, page 1026, after discussing the cases, says the great weight of authority is: "That all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence." The same definition is substantially given by Beach on Contributory Negligence, third edition, section 330, page 473. The same definition has, in substance, been laid down by this court in numerous cases. In *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 368, 26 Pac. 175, it is said: "The law of this state respecting this subject, as set forth in the code referred to, recognizes no distinction growing out of the

grades of employment of the respective employés; nor does it give any effect to the circumstances that the fellow-servant, through whose negligence the injury came, was the superior of the plaintiff in the general service in which they were in common engaged."

We think that Howes was a fellow-servant of plaintiff under the authorities above cited. He was in the employ of defendant, ⁵³ so was plaintiff. He was under the supervision of defendant's superintendent, and so was plaintiff. They were both engaged in the same labor—blasting. It is urged that Howes was a vice-principal, and therefore his negligence was the negligence of defendant. We do not think the doctrine of vice-principal can be applied to Howes, or that he was a vice-principal under the rule as established in this state. There is much conflict in the decisions of the highest courts of the different states of the Union upon this much discussed question. Within the past twenty-five years hundreds of opinions have been written upon it, and as yet no general rule has been adopted. In this state the Civil Code, section 1970, lays down this general rule: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé."

In the case of *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 368, 26 Pac. 175, it was held, under this section, that a brakeman and a conductor on a railroad train are persons "employed by the same employer in the same general business within the meaning of the above section." In the opinion it is said: "This section of the code not only restates the rule first established by judicial decision as to the injury received through the negligence of a fellow-servant, but it clears away to a great extent the difficulties which may have existed as to the meaning of 'fellow-servant.' It declares them to be those employed 'in the same general business.' And if the employés on a train of cars, including the engineer, the conductor, the fireman, and the brakeman, are not persons employed in the same business, it would be difficult to imagine a set of men who could be considered as so employed."

In *Stephens v. Doe*, 73 Cal. 27, 14 Pac. 378, it was held that "the foreman of a mine and a miner employed to work under

his directions are fellow-servants" within the meaning of said section 1970.

It is claimed that it was the duty of defendant to have warned the plaintiff when a blast was about to be fired, and that he cannot escape such duty imposed upon him by claiming that the injury ⁵⁴ was caused by the negligence of one in his employ. If it were an absolute duty of defendant to have warned plaintiff of the approaching danger, the same as it was his duty to furnish him a safe place in which to work, and safe and proper machinery and appliances, then the rule would apply. But we think the defendant was under no legal duty to give the plaintiff personal warning. He employed a competent man to give such warning, and thus furnished adequate and proper means for the purpose. When he employed a competent person whose duty it was to give the warning his liability ceased. In most cases it would be impracticable for the employer to perform such duty personally. In the case of a corporation it would be impossible. The plaintiff testified that the place in which he was working was safe when no blasts were being fired. That he expected to be notified in time to get out before any firing of a blast. He knew the means employed for the purpose of notifying him and assumed the risk.

Beach, after a review of the legal definitions of negligence, defines it to be "the breach or omission of a legal duty": Beach on Contributory Negligence, sec. 6. It is the duty of the employer to furnish the employé suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provision for the safety of the employés as will reasonably protect them from the dangers incident to their employment: *Daves v. Southern Pac. Co.*, 98 Cal. 24, 35 Am. St. Rep. 133, 32 Pac. 708; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 423, 49 Pac. 559. In this case the defendant did not omit any legal duty within the definition of the above cases. We think the conclusion we have reached is amply supported by the authorities.

In *McLean v. Blue Point etc. Min. Co.*, 51 Cal. 256, the plaintiff was in the employ of defendant as a laborer in the vicinity of where defendant was blasting rock in a mine. One Kegan was defendant's foreman, and had authority to employ and discharge hands. Plaintiff was injured by a rock thrown from a

blast, owing to the negligence of Kegan in not notifying him ⁵⁵ that the blast was about to be fired. It was held that the negligence was that of a fellow-servant and that plaintiff could not recover. In *Stephens v. Doe*, 73 Cal. 27, 14 Pac. 378, the plaintiff had been employed by defendant as a miner, and, under the orders of defendant's foreman, had set off a blast. After the blast had been fired, plaintiff, under orders of the foreman, proceeded to inspect the result of the blast to discover if any ore had been thrown down thereby, and, while in the act of doing this, rocks which had been loosened by the blast fell upon him, crushing the bones of one of his legs and otherwise injuring him. He claimed that the foreman was negligent in ordering him to an unsafe place. It was held that he could not recover, and that the negligence was that of a fellow-servant. In *Daves v. Southern Pac. Co.*, 98 Cal. 24, 35 Am. St. Rep. 133, 32 Pac. 708, it appeared that Daves was engaged in some way with a hand-car on a sidetrack, at a place where Bresnahan, the section foreman, had sent him. It was the duty of Bresnahan to close the switch after opening it, so that the train would not run on the sidetrack. He did not do so, and the train ran into the sidetrack and killed Daves. The action was brought by his widow and minor children. It was held that the negligence was that of a fellow-servant, and that plaintiffs could not recover.

In the late case of *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853, it appeared that the chute led from the wharf to a port in the vessel's side. Defendant was engaged with a gang of men between the decks loading lumber. The pieces of lumber were passed in the chute by another set of men under charge of a foreman. It was the duty of one of the men on the wharf to give a warning cry when a piece of lumber was placed in the chute, in order to enable those below to get out of the way. The place in which the men below were working was safe, provided the warning cry was given. The man to whom the duty of giving the warning cry was intrusted was a competent and proper person. He omitted to give the warning cry when a large piece of lumber was sent down the chute, and plaintiff was struck by it and injured. The learned opinion of the circuit judge reviews the authorities fully, citing many state and federal cases, and holds that the negligence was that of a fellow-servant, ⁵⁶ and that plaintiff could not recover. It is needless to multiply authorities, and a few only will be here cited: *The Harold*, 21 Fed. 428; *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 361,

26 Pac. 175; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 419, 49 Pac. 559. We do not think, under the authorities cited, that the question as to whether or not Howes was a vice-principal should have been left to the jury.

It does not appear that the blasts were exploded in violation of any ordinance. Defendant obtained permission of the board of supervisors, after filing a bond and complying with the regulations of the board, "to use two thousand pounds of powder in the blasts to be set off on the property northwest of the Spring Valley Water Works reservoir on Clarendon Heights." It was admitted that the blasts were set off on the property described in the permit. If the ordinance had prohibited the use of more than two thousand pounds in any blast, it would have to appear that more than two thousand pounds was used in such blast. It does not so appear in this case. The plaintiff called Howes as a witness, and after he had testified in chief the defendant's counsel, in cross-examination, asked him this question: Q. As superintendent, did, or did not, Mr. Davidson, have control and authority to direct you? The witness was permitted to answer the question under the plaintiff's objection that it called for a conclusion. The ruling, if error, would not be of sufficient importance to justify the reversal of the case; but we do not think it was error. The witness in direct examination had testified that he was employed by the superintendent, and was under the directions of the superintendent. If the plaintiff was employed by the superintendent, the court knew, as a matter of law, without the assistance of the opinion of the witness, that the superintendent had authority to direct him.

We advise that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

Hearing in Bank denied.

A MASTER OWES TO A SERVANT THE DUTY of providing him a reasonably safe place in which to work, of providing and keeping in repair reasonably safe tools and appliances for the work to be done, and of exercising diligence in the employment of reasonably competent men to perform their respective duties: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 591, 592.

FELLOW-SERVANT.—A MASTER IS NOT ANSWERABLE for an injury to his servant occasioned by the negligence of a fellow-servant: *Newbury v. Getchel etc. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743.

VICE-PRINCIPAL.—WHO IS a vice-principal is the subject of the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 584-640.

BLASTING—WARNING BY FOREMAN.—A foreman's duty to give warning to his coemployés of dangers incident to the work is that of the master, who is answerable for his negligence in case of injury, as where he fails to warn workmen in a stone quarry to seek safety from the explosion of a blast: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 618.

WITTENBROCK v. WHEADON.

[128 Cal. 150, 60 Pac. 664.]

PRE-EMPTION CLAIM.—A PRE-EMPTOR ACQUIRES NO ESTATE, legal or equitable, in public land until the amount of the purchase money has been paid. By filing his declaratory statement he merely acquired the privilege of making payment for the land and receiving a patent therefor from the United States in preference to any other applicant.

PRE-EMPTION CLAIM—EFFECT OF DEATH.—IN THE ABSENCE OF ANY STATUTE upon the subject, the privilege given by the government to a pre-emptor of public land to receive a patent therefor upon payment of the purchase money would lapse with his death.

PRE-EMPTION CLAIM—TITLE OF HEIRS.—Under a United States statute allowing the heirs of a deceased pre-emptor to complete his claim by filing the necessary papers and paying the purchase price, such heirs do not take the title by descent from their ancestor, but the land is conveyed to them directly from the United States by virtue of the privilege of purchase given to them by the statute.

PRE-EMPTION CLAIM—ESTATE OF DECEASED PRE-EMPTOR.—Land taken by a pre-emptor who has not completed his purchase forms no part of his estate; hence, it cannot be devised nor subjected to the jurisdiction of a probate court; neither can it be sold to satisfy the pre-emptor's debts or to pay the expenses of administration, nor can it be affected by a decree of distribution.

PRE-EMPTION CLAIM—DECLARATION OF HOMESTEAD—EFFECT ON HEIRS.—A pre-emptor, prior to the payment of the purchase money, has no title in the land, but merely a privilege which terminates at his death, and a declaration of homestead filed by him under the state laws cannot affect the title of the heirs under a subsequent patent from the United States, since such patent is not the perfecting of a title which was inchoate in the pre-emptor at the time of his death, but is a new and independent source of title.

ESTATES OF DECEDENTS.—THE HEIRS of a deceased are determined by the laws of the state under which the descent

is cast, and comprise those whom the law appoints to succeed to a decedent's estate in case he dies without disposing of it by will.

PRE-EMPTION CLAIM—TITLE OF HEIRS—LAW OF INHERITANCE.—Where a pre-emptor dies before completing his purchase, the heirs do not take the land by inheritance from their ancestor, but by direct conveyance from the United States; hence the portion taken by each heir is not determined by the law of inheritance, but by the terms of the conveyance.

Driver & Sims, for the appellant.

Judson C. Brusie and Edward J. Dwyer, for the respondent.

151 HARRISON, J. Ejectment. May 4, 1866, Theodore Wheadon resided with his family upon the land described in the complaint, and filed a declaratory statement with the land department of the United States for its pre-emption. January 26, 1869, he filed with the county recorder a declaration of homestead upon the land, which in form complied with the laws of this state. March 14, 1871, he died, leaving as his heirs at law his widow and three children, without having received a patent for the land, and without having made any payment therefor other than the fees for filing his declaratory statement. March 30, 1871, his widow was appointed administratrix of his estate, and on April 3d filed an inventory thereof, including these premises, which were appraised at seven hundred and fifty dollars, but making no mention of any claim of homestead thereon. November 5, 1886, the superior court made a decree of distribution of his estate, by which one-half thereof was allotted to the widow and one-sixth to each of his children, of whom the defendant and appellant is one.

After his death his widow applied for the issuance of a patent on said pre-emption claim, under the provisions of section 2269 of the Revised Statutes of the United States, and made payment for the land, and did whatever else was required under the statute, or by the officers of the government, and on April 1, 1874, a patent was issued by the United States to the "heirs of Theodore Wheadon, deceased." March 20, 1896, Isabell Wheadon, the widow, and George T. Wheadon, one of the children of Theodore, made a conveyance of the premises by deed of bargain and sale to plaintiff. The plaintiff thereupon brought this action to recover the possession of the land from the defendant. Judgment was rendered in his favor, and, a new trial having been denied, the defendant has appealed from this order.

152 By filing his declaratory statement Theodore Wheadon acquired the privilege of making payment for the land and receive-

ing a patent therefor from the United States in preference to any other applicant, but no estate in the land was acquired or right thereto vested in him, unless and until the amount of the purchase money was paid: *Hutton v. Frisbie*, 37 Cal. 475; *Frisbie v. Whitney*, 9 Wall. 187; *Buxton v. Traver*, 67 Cal. 171, 7 Pac. 450; affirmed, 130 U. S. 232, 9 Sup. Ct. Rep. 509. In the absence of any statute upon the subject, the privilege thus given by the government would lapse with his death (*Elliott v. Figg*, 59 Cal. 117), and the land be open to entry by anyone. Section 2269 of the Revised Statutes of the United States, however, makes the following provision for this contingency: "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned." The title thus given by the patent is not to the estate of the decedent, but by the terms of the section the patent shall "cause the title to inure to such heirs." The heirs do not take the title by descent from their ancestor, but the land is conveyed to them directly from the United States by virtue of the privilege of purchase given to them expressly by the provisions of this section: *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12; *Caldwell v. Miller*, 44 Kan. 12, 23 Pac. 946; affirmed, *Hutchinson Inv. Co. v. Caldwell*, 152 U. S. 65, 14 Sup. Ct. Rep. 504. The land is not subject to devise by the pre-emptor, nor can it be sold in satisfaction of his debts or for the expenses of administration: *Rogers v. Clemmans*, 26 Kan. 522.

As the land was no part of the estate of Theodore Wheadon, it was not subject to the probate jurisdiction of the superior court, and is not affected by the decree of distribution of his estate subsequently made by that court. Neither is the title which inures to the heirs by the patent affected by the declaration of homestead filed by him. At the time it was filed and recorded he had no estate, legal or equitable, in the land, but **153** merely a privilege which terminated at his death. The title conveyed to the heirs by the patent is not the perfecting of a title which was inchoate in him at the time of his death, but the patent is a new and independent source of title which was never ar-

fect by his declaration of homestead. The right of the widow to apply for the patent was given to her, not as a survivor of the community, but as an heir of the deceased, and the application, whether made by her alone or by all of the heirs, was required to be made in favor of all of the heirs of the deceased, and by the terms of the section the patent inured to such heirs "as if their names had been specially mentioned." In *Elliott v. Figg*, 59 Cal. 117, it was held the administrator was not entitled to complete an entry which had been initiated by his intestate in the absence of a showing that his intestate had left any heirs. In *Rogers v. Clemmans*, 26 Kan. 522, the administrator paid for the land out of the estate of the decedent and received a patent to the "heirs" of the deceased, without mentioning their names, and afterward, under an order of the court, sold the land in payment of the debts of the estate and costs of administration. It was held that the purchaser acquired no title against that of the heirs.

For the purpose of determining who are the heirs of the deceased resort is to be had to the laws of the state under which the descent is cast: *Caldwell v. Miller*, 44 Kan. 12, 23 Pac. 946. "The heirs of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will": *Hochstein v. Berghauser*, 123 Cal. 681, 56 Pac. 547. Under the law of this state the widow and three children were the heirs of Theodore Wheadon, and became vested with the title to the land. As they did not take the land by inheritance from their ancestor, but by direct conveyance from the United States, the portion taken by each heir is not determined by the law of inheritance, but by the terms of the conveyance: *Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591. Section 2269 vests the land in them equally, and, consequently, the widow and each of the children took by the patent an undivided quarter of the land: See *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. 1046.

The order is reversed.

Garoutte, J., and Van Dyke, J., concurred.

PRE-EMPTOR—TITLE OF.—A mere right of pre-emption is not a title, but only a proffer to a certain class of persons that they may become purchasers if they will, but without payment or an offer to pay it confers no equity. The settler acquires a vested right for the first time when he has complied with all the preliminary acts prescribed by Congress, including the payment of the price of the land: *Note to Henry v. Welch*, 23 Am. Dec. 493. See,

further, *Jones v. Meyers*, 2 Idaho, 793, 35 Am. St. Rep. 259, 26 Pac. 215; notes to *Tyler v. Green*, 87 Am. Dec. 132-134; *Moffatt v. Bulson*, 31 Am. St. Rep. 197; *Wilcox v. John*, 52 Am. St. Rep. 252. An owner of a timber claim upon public land has no devisable interest therein until a patent issues: *Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591.

HEIRS ARE THE PERSONS in whom real estate vests by operation of law on the death of the one last seised: *Dukes v. Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745, 12 S. E. 122. Descent and heirship of real estate are governed exclusively by the law of the country within which it is situate: *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, 16 South. 783.

WICKSON v. MONARCH CYCLE MANUFACTURING COMPANY.

[128 Cal. 156, 60 Pac. 764.]

STATUTE OF FRAUDS—PAROL AGREEMENT FOR ONE YEAR TO BEGIN IN THE FUTURE.—Under a statute which requires an agreement to be in writing which “by its terms is not to be performed within a year from the making thereof,” a parol agreement for a one year lease to commence in the future is invalid, since the statute of frauds applies if the time from the making of an agreement to the end of its performance exceeds a year never so little.

STATUTE OF FRAUDS—CONSTRUCTION OF CONFLICTING SECTIONS—PAROL LEASE.—Where one section of a statute provides that an agreement shall be in writing which by its terms is not to be performed within a year from the making thereof, and a later section provides that a lease for a longer period than one year shall be in writing, the two sections must be read together, and as so read a parol lease is valid for one year, but must be for no longer than one year from the time it is made.

Daniel Titus, Louis Titus, and Bigelow & Titus, for the appellant.

Chickering, Thomas & Gregory, for the respondent.

¹³⁸ COOPER, C. This is an appeal by plaintiff from a judgment in favor of defendant, and comes here on the judgment-roll and a bill of exceptions. It appears from the evidence offered by plaintiff that on the twenty-eighth day of December, 1895, plaintiff and defendant entered into a parol agreement, by the terms of which plaintiff agreed to let to defendant certain premises on Front street, in the city and county of San Francisco, for the term of one year from January 1, 1896, at the monthly rent of two hundred dollars per month, and ten per cent on all retail sales to be made by defendant. Defend-

ant entered under the lease and paid the agreed rent for eight months of the term, when without the consent of plaintiff, it vacated the premises and refused to pay further rent. At the close of plaintiff's testimony a nonsuit was granted on motion of defendant and judgment entered accordingly. The main question in the case is as to the validity of the parol agreement for a one year lease to commence in futuro. It is said by counsel that the question has never been decided in this state, and we are called upon to lay down the rule for the first time. The statute of 29 Charles II, chapter 3, which is the foundation of most of the provisions of the statutes of frauds of the several states, enacted that all leases, estates, or terms of years, or any uncertain interest in land, created by livery only, or by parol and not reduced to writing and signed by the party making the same, or his agent, should have no other force or effect than a mere estate at will; excepting leases for a term not exceeding three years, whereupon the rent reserved shall amount to two-thirds of the full improved value of the premises. Section 1624 of the Civil Code of this state provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: 1. An agreement that by its terms is not to be performed within a year from the making thereof; . . . 5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or for any interest therein."

¹⁵⁹ We think the agreement in this case void under the express provisions of subdivision 1 of said section. The agreement was made December 28, 1895, and was not to be performed until January 1, 1897. This was more than one year "from the making thereof." It is true the time was only some three days more than a year after the contract was made, but we are not at liberty to extend it three days, nor any time beyond the year. If we could extend it three days, upon the same reasoning we could extend it three months or three years. It is said by Browne in his work on the Statute of Frauds: "It need only be added to what has been said that, if the time from the making of the agreement to the end of its performance exceeds a year never so little, the statute applies; for, in the language of Lord Ellenborough, 'if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop,

for in point of reason an excess of twenty years will equally not be within the act.'"

The contract could not possibly have been performed until one year from January 1, 1896, because the defendant had the full right under the contract, if valid, to the possession of the leased premises for all of the year 1896. Plaintiff could not have performed the contract until he had given defendant the possession for the full year.

It is argued by plaintiff that subdivision 5 of the section has the effect of making a lease for one year valid, no matter when it is to commence, and that said subdivision should govern regardless of subdivision 1. If this be the true construction of the statute the plaintiff, by parol, might have executed to defendant a valid lease of the premises for three years by three separate parol leases, one to commence January 1, 1896, one January 1, 1897, and one January 1, 1898. This reasoning would apply to any number of years, or to any number of leases made to different individuals, provided they did not conflict in point of time. The two subdivisions are to be read and construed together, and, as so read, a parol lease is valid for one year, but must be for no longer than one year from the time it is made. If it be such a lease as by its terms is to be performed within the year from the making thereof, it is valid. This is ¹⁶⁰ the construction of the English courts upon the original statute, 29 Charles II, in *Raulins v. Turner*, 1 Ld. Raym. 736, where it is said: "It was ruled by Holt, Chief Justice, at Lent assizes at Kingston, 1699, that such lease for three years of land as will be good without deed within the statute of 29 Charles II, chapter 3, section 2, must be for three years, to be computed from the time of the agreement, and not for three years to be computed from any day after": *Hurley v. McDonnell*, 11 U. C. Q. B. 208; *Kaatz v. White*, 19 U. C. C. P. 36. The same construction has been followed in most of the states: *Taylor on Landlord and Tenant*, 8th ed., sec. 30, and notes; *Wolf v. Dozer*, 22 Kan. 436; *Pulse v. Hamer*, 8 Or. 251; *White v. Holland*, 17 Or. 4, 3 Pac. 573; *Olt v. Lohnas*, 19 Ill. 576; *Comstock v. Ward*, 22 Ill. 248; *Cooney v. Murray*, 45 Ill. App. 464; *Delano v. Montague*, 4 Cush. 44; *Chapman v. Gray*, 15 Mass. 443; *Jellett v. Rhode*, 43 Minn. 167, 45 N. W. 13; *Johnson v. Albertson*, 51 Minn. 335, 53 N. W. 642; *Engler v. Schneider*, 66 Minn. 388, 69 N. W. 139; *Bain v. McDonald*, 111 Ala. 272, 20 South. 77; *Beiler v. Devol*, 40 Mo. App. 254; *Cook v. Redman*, 45 Mo. App. 397; *Whiting v. Pittsburg Opera House Co.*, 88 Pa. St. 101; *Birck-*

head v. Cummings, 33 N. J. L. 44, 51; Reed on Statute of Frauds, sec. 813. The author in the work last cited says: "The question always is whether the interval from the making the agreement to the expiration of the lease is or is not more than three years."

The contrary doctrine has been held by the highest courts of some of the states, but upon examination it will be found that most of the decisions are upon statutes differing materially from ours. The case of *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356, is the leading case in favor of the contention claimed by plaintiff, and the case followed by the other New York decisions and in some of the decisions of other courts. In that case the court, after discussing sections 6 and 8 of the Revised Statutes of New York (2 Rev. Stats. 134), as the sections formerly existed, and as they existed at the time of the decision, held that the sections had been materially changed and the words "from the making thereof" omitted. In the opinion it is said: "The term three years, as proposed, was reduced in the enactment to one year, and the words 'from the making thereof, entirely omitted.'"

¹⁶¹ It was contended in that case that under section 2, subdivision 1, page 135, of volume 2 of the Revised Statutes, the lease was void because not to be performed within a year from the making thereof. But the court held that subdivision 1 of section 2 did not apply to a contract concerning lands. The language used is: "That provision of the statute is a part of title 2 of the statute to prevent frauds in conveyances and contracts; and the whole of that title and all its provisions has reference only to 'fraudulent conveyances and contracts relative to goods, chattels, and things in action.' It is very obvious that none of its provisions have any application to, or effect upon, contracts or agreements concerning lands, or interest in lands. The first title performs that office; the second title applies to contracts and transactions affecting personal property only." It is thus evident that the New York cases are not authority as to the construction of our statute.

The case of *Huffman v. Starks*, 31 Ind. 475, follows the construction of the supreme court of New York in *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356, but under the Revised Statutes of Indiana of 1852, chapter 42, which stated: "5. That upon any agreement which is not to be performed within one year from the making thereof . . . except under leases not exceeding the term of three years," it is obvious that leases are, under

the Indiana statute, expressly excepted from the *infra annum* clause.

The case of *Steininger v. Williams*, 63 Ga. 475, was under section 2280 of the code of Georgia, which provides that "contracts creating the relation of landlord and tenant for any term not exceeding one year may be by *parol*."

It has been held in Colorado, Texas, Mississippi, and perhaps other states, that under statutes similar to ours a *parol* lease for the time named in the statute to commence in *futuro* is valid. But we think the decisions which so hold are contrary to the great weight of authority. The rule herein announced is in our opinion founded upon the better reason and is the correct interpretation of the two subdivisions of the section of the code. It is urged by plaintiff that the contract on the part of defendant was to be performed within a year from the making thereof; that the rent was all to be paid according to the terms of the lease on December 1, 1896; and that this takes the case ¹⁶² out of the statute. There is a sharp conflict in the authorities as to whether or not a contract that is to be wholly performed on one side within the year is within the inhibition of the statute. The view we take of this case renders it unnecessary to decide the question. The agreement as alleged in the complaint, and as proven, could not have been wholly performed by defendant within the year. The law imposed upon the defendant under the lease certain obligations. Among these obligations was that of using the premises in a reasonable and prudent manner and not to commit waste thereon, not to attorn to a stranger, and to surrender up the premises at the end of the term in as good condition as they were at the time of defendant's entry, reasonable wear and tear thereof excepted.

We advise that the judgment be affirmed.

Britt, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Garoutte, J., Van Dyke, J., Harrison, J.

Hearing in Bank denied.

PAROL LEASE.—On the principle that the year within which a verbal contract must be performed in order to escape the bar of the statute of frauds must commence from the date of the contract, and not from the date of entering upon its performance, most of the cases decide that an oral lease for a year to begin in the future is void: See the monographic note to *Wallace v. Scoggins*, 17 Am. St. Rep. 753.

LUNDY FURNITURE COMPANY v. WHITE.

[128 Cal. 170, 60 Pac. 759.]

CONDITIONAL SALE—SALE ON INSTALLMENTS—INSTRUMENT IN FORM OF LEASE.—A written contract in the form of a lease of personal property, by the terms of which payments were to be made in monthly installments, designated rent, the title to remain in the lessor until the final payment was made, at which time a bill of sale was to be given and the transaction closed, is a conditional sale and not a lease.

F. A. Berlin, for the appellant.

Denson, Oatman & Denson, for John H. Roberts, intervenor, one of the respondents.

George H. Perry, for Charles Levy & Co., one of the respondents.

W. W. Allen, for Sterling Furniture Company, one of the respondents.

¹⁷¹ HENSHAW, J. This is an action of claim and delivery. The Lundy Furniture Company, under a written contract hereinafter to be considered, delivered certain goods to Johanna White. The defendants Charles Levy and Henry Meyer claimed as purchasers from Johanna White. John Roberts, the intervenor, claimed as assignee of a mortgage made by Johanna White to the defendants, Bier & Regensburger. The intervenor sought a foreclosure of his mortgage. The court rendered judgment in favor of the intervenor for the goods replevied by plaintiff, or for three hundred and seventy dollars found to be the value thereof, directed the foreclosure of his mortgage, and provided that after payment of the amount due on the mortgage the remainder should be paid to the defendants Levy & Co., as purchasers from Johanna White. The court thus determined that the transaction between the Lundy Furniture Company and Johanna White was an absolute sale of the personal property in question.

The written contract under which plaintiff delivered possession of the property to defendant Johanna White is designated a lease. The true construction of this instrument is the principal matter in controversy. By its terms the property was delivered ¹⁷² to Johanna White at the monthly rent of forty dollars, payable upon the twenty-fifth day of each and every month, until the rents paid should aggregate the sum of eleven hun-

dred and ninety-eight dollars and forty-five cents, which was agreed between the parties to be the value of the property. "And until the said sum has been fully paid the title to said property shall remain in the party of the first part, after which the party of the first part shall make a bill of sale of the same to the party of the second part." The instrument further provided for the prompt payment of rents, for the insurance of the property, and that the lessee would not remove it from her residence without the written consent of the furniture company.

It is quite true, and has been often said, that the name by which the parties designate their contract is not determinative of its nature. The calling of this agreement a lease did not make it such. Reference is to be had to the instrument itself, to a reading and consideration of all its terms, conditions, and covenants, to determine its true character. So considering it, we think there can be no doubt that the contract was one of conditional sale, with possession given to the vendee. The payments to be made monthly in installments, designated rent, were in fact nothing but partial payments. The title was to remain in plaintiff until the final payment was made, at which time a bill of sale was to be given to Johanna White, and the transaction thus closed. This court, in both departments, has so recently been called upon to consider the nature of such contracts, that it is unnecessary here to enter into an elaborate discussion of them. Suffice it to refer to the cases of *Van Allen v. Francis*, 123 Cal. 474, 56 Pac. 339, and *Perkins v. Mettler*, 126 Cal. 100, 58 Pac. 384.

The conclusion thus reached renders unnecessary the consideration of certain minor points as to the value of the property and the right of the court to decree a foreclosure in favor of the intervening assignee of the mortgagee.

For the foregoing reasons the judgment and order appealed from are reversed.

Temple, J., and McFarland, J., concurred.

CONDITIONAL SALE.—A LEASE of personal property, containing conditions for the payment of rent at stated times, and on the last payment of rent the property to belong to the lessee, in the meantime the title to remain in the lessor, is in effect a conditional sale: *Clark v. Hill*, 117 N. C. 11, 53 Am. St. Rep. 574, 23 S. E. 91. See, further, the note to *Andrews v. Colorado Sav. Bank*, 46 Am. St. Rep. 295-298.

ESTATE OF HENNING.

[128 Cal. 214, 60 Pac. 762.]

GUARDIANS—RIGHT TO APPEAL—MINORS NOT BROUGHT WITHIN STATE.—A discharged testamentary guardian may be heard on an appeal from an order appointing a succeeding guardian without first bringing the minors within the jurisdiction of the court, where he claims to be the guardian of such minors by appointment of a competent court in another state, where there was no objection made in the lower court to his appearance, and he had never been ordered to bring the minors to California, so that he was not in default in that regard.

GUARDIANS—POWER OF COURT TO APPOINT.—Where one of the guardians appointed by a will is dead and the other has resigned, the power of the court to appoint a succeeding guardian is the same as if no appointment at all had been made by the will.

INFANTS—DOMICILE.—WHERE PARENTS of minors are domiciled in a certain state, such state becomes at their death the domicile of the minors, until it is shown to have been changed by competent authority.

INFANTS ARE INCAPABLE THEMSELVES OF CHANGING their own domicile.

INFANTS—DOMICILE—REMOVAL TO ANOTHER STATE—DISCHARGE OF GUARDIAN.—Where minors are permitted to be removed to another state, "to remain until the further order of the court," a subsequent discharge of their guardian without being ordered to return the wards to the state raises no presumption that the court has abandoned its jurisdiction over the persons of the wards, and their domicile still remains in the state from which they had been removed.

INFANTS—DOMICILE AND RESIDENCE—JURISDICTION.—UNDER A STATUTE giving jurisdiction over the persons and estates of minors who are "inhabitants or residents of the county," the word "residence" means domicile or home, as distinguished from a temporary residence, and includes jurisdiction over minors who are temporarily residing in another state.

Henry E. Munroe, for the appellant.

John Yule and John M. Poston, for the respondent.

216 THE COURT. The matter is before us on an agreed statement of facts which respondent concedes are correctly summarized **217** in appellant's brief, as follows: "In the year 1892 Clara Henning, the widowed mother of these minors, died testate in the city and county of San Francisco. By her last will, which was duly admitted to probate, she appointed George C. Shreve, of San Francisco, and David A. Henning, of the state of South Carolina, guardians of the persons and estates of these minors. Shreve and Henning accepted the trust and duly qualified October 20, 1892. On the first day of December, 1892,

David A. Henning obtained an order of court permitting him to remove these minors to the residence of their grandparents, Isaac L. and Mary Henning, in the city of Sommerville, state of South Carolina, which was also the residence of said David A. Henning, there to remain until further order of court. The children were thereupon removed by their guardian to South Carolina, where they have ever since lived, either with their grandparents, or with their guardian, David A. Henning. In October, 1893, George C. Shreve died, and on the third day of August, 1894, David A. Henning filed his written resignation of his trust as guardian of the minors, and a petition for his discharge. On the fourteenth day of August, 1894, his resignation was accepted by the court, and an order made and filed settling his account and granting his discharge. This order made no provision as to the care, custody, or residence of these minors, and at the time when the order was made they were still living in South Carolina. On the seventeenth day of August, 1894, Mary E. De Cora, the respondent herein, filed a petition praying for her appointment as guardian of the persons and estates of these minors. The appellant answered this petition, denying that these minors were residents of the city and county of San Francisco. On the twenty-third day of March, 1897, an order was made granting the petition of respondent, and David A. Henning appeals to this court from so much of this order as appoints respondent guardian of the persons of these minors." The children are aged ten and twelve years, respectively.

It should be added that, by order of the court, notice of the hearing of respondent's petition was served upon Henning as well as the minors, and no question is raised as to the service. Henning appeared by answer and at the hearing by counsel.

²¹⁸ 1. Respondent suggests in limine that Henning ought not to be heard without first bringing the minors within the jurisdiction of the court, because on his application they were removed to South Carolina, "there to remain until further order of the court," and because, when respondent's petition was filed, Henning had been discharged as guardian. There is an allegation in his answer that he was, when the petition was filed, guardian of the persons and estate of the minors by order of a court of competent jurisdiction in South Carolina duly given and made. There was no objection made in the lower court to the appearance of Henning and the order of the court required service of notice upon him that he might appear; and

he has never been ordered to bring the minors to California, so that he is in no default in that regard. Under the circumstances we see no reason why he should not be heard on this appeal.

2. The only error specified is that the evidence is insufficient to justify the finding and decision that the said minors were residents of this state when the order was made, and that the order appointing a guardian of the person of the minors is void. The code provisions upon the subject of appointing guardians are as follows: "A guardian of the person and estate may be appointed by will or by deed, to take effect upon the death of the parent appointing": Civ. Code, sec. 241. "A guardian of the person or property, or both, of a person residing in this state, who is a minor, may be appointed in all cases, other than those named in section 241 by the superior court, as provided in the Code of Civil Procedure": Civ. Code, sec. 243. "A guardian of the person is charged with the custody of the ward, and may fix the residence of the ward at any place within the state, but not elsewhere, without permission of the court": Civ. Code, sec. 248.

In the present case, guardian Shreve died and Henning resigned and was discharged. Section 1801 of the Code of Civil Procedure provides for such resignation and authorizes the court to appoint another guardian in the place of the one resigning. "The superior court may appoint guardians for the persons and estates, or either of them, of minors who ²¹⁹ have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county," etc.: Code Civ. Proc., sec. 1747.

One of the guardians appointed by the will having died and the other having resigned and been discharged, the minors were without guardians appointed by will, and the court had jurisdiction to appoint, under the provisions of section 1747 of the Code of Civil Procedure, unaffected by the sections of the Civil Code referred to; the power was the same as if no appointments at all had been made by will; the death of one and resignation of the other guardian terminated the guardianship.

Respondent relies upon *Gronfier v. Puymirol*, 19 Cal. 629, to support the order made here, but the legal soundness of the appointment need not rest upon that case. The parents of the minors were, at their death, domiciled here, and their domicile became the domicile of their children. As infants they were

incapable themselves of changing their domicile, and as there is no evidence that it was changed by anyone having authority, or at all, for that matter, their domicile is still in the city and county of San Francisco: Woerner's Law of Guardianship, sec. 26, p. 80. There is nothing in the record to show for what purpose the children were taken to South Carolina, and the order permitting their removal to that state, "to remain until the further order of the court," indicates no intention to surrender jurisdiction of their persons; on the contrary, the order implies the retention of such jurisdiction. The fact that Henning was discharged without being ordered to return the wards to this state gives rise to no presumption that the court had abandoned its jurisdiction over the persons of the wards; their domicile still remained in San Francisco. They are absent from the state, but there is no evidence tending in any way to show that their residence in South Carolina is anything but temporary. We cannot presume that their domicile is changed, nor can we presume that their residence has become permanent in South Carolina. Whatever presumptions are indulged upon these questions must be in favor of the jurisdiction.

Appellant cites numerous cases to show that it is a question of residence and not domicile which determines the power of ²²⁰ the court to appoint a guardian of the person; that the code authorizes the appointment of guardians for the persons and estates of minors who are "inhabitants or residents of the county," but that neither of these terms is equivalent to domicile. The argument seems to be that the residence of the minors became fixed in South Carolina under the permission of the court, and as the guardian was allowed to resign without himself voluntarily having returned the wards to this jurisdiction, and as he was not ordered to do so, and is not now subject to any such order, the wards are no longer within this jurisdiction. Mr. Woerner, at the page of his valuable treatise already cited, says: "The residence of infants conferring the jurisdiction in the sense of these statutes [statutes giving jurisdiction where the residence is within the county] means domicile, or home, as distinguished from residence, which may be temporary, or for a special purpose." However this may be, the word "domicile" certainly includes residence, conceding, as is the fact, that there may be a temporary residence separate from the domicile and at the same time (Woerner's Law of Guardianship, 82); and as we think the evidence and the presumptions fix both the domicile and the residence of these children at San

Francisco, we cannot see that the cases relied upon have application.

What may be or should be held in the event that a guardian of the persons should be appointed in South Carolina, and that the best interests of the minors should require that they permanently take up their abode in that state, and application should be made under the provisions of our code by their guardian appointed in that state to allow the removal of any property situated in this state, susceptible of removal, to the state of the ward's residence, are questions which may be remitted to the tribunal before which they may come. The parties in interest may have the assurance that our courts will be governed by the enlightened spirit of comity which should prevail between sister states of the Union, subject to such legislative restrictions as our statutes impose and agreeably to established rules of law.

For the foregoing reasons the order is affirmed.

DOMICILE.—AN INFANT cannot, of its own volition, change its domicile: *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628; *Allen v. Thomason*, 11 Humph. 536, 54 Am. Dec. 55; during his minority he must retain the domicile of his parents: *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202. The domicile of origin of a minor continues, notwithstanding the death of his parents, though he has been taken into another state, unless the domicile was changed by consent of the parents or of the last surviving parent: *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628.

DOMICILE AND RESIDENCE are distinguished in the monographic note to *Berry v. Wilcox*, 48 Am. St. Rep. 712.

GUARDIANS.—**JURISDICTION TO APPOINT** guardians is discussed in the monographic note to *De la Montanya v. De la Montanya*, 53 Am. St. Rep. 185-189.

EX PARTE LORENZEN.

[128 Cal. 431, 61 Pac. 68.]

LEGISLATURE—MAKING ACT CRIMINAL.—The legislature, acting within constitutional limitations, has power to make penal an act theretofore indifferent or even innocent.

MUNICIPAL CORPORATIONS—ORDINANCE REGULATING STREET-CAR TRANSFERS—CONSTITUTIONALITY.—A municipal corporation has power to pass any reasonable regulation affecting street-car lines to remedy an interference with the comfort, convenience, and general welfare of the traveling public. Hence an ordinance making it a misdemeanor for any person ex-

cept the conductor or agent of the street-car line to give, sell, or issue any transfer check or ticket issued for passage on any street-car or line, the main purpose of which is to promote the convenience and welfare of the traveling public and not an attempt by penal legislation to enforce a private contract, is legitimate, and does not violate the constitutional guaranties protecting personal liberty or the right of private property.

MUNICIPAL ORDINANCE—REGULATING STREET-CAR TRANSFERS—RESTRICTING USE OF PRIVATE PROPERTY.—A municipal ordinance which makes penal the disposal in any manner by a passenger of a street-car transfer check, but which leaves him all the rights which he enjoyed under his contract, and at most merely makes penal what before was illegal and against good morals, is a legitimate restriction on the use of private property.

MUNICIPAL ORDINANCE—GENERAL TERMS—REASONABLE CONSTRUCTION—STREET-CAR TRANSFERS.—A municipal ordinance forbidding a passenger from disposing in any manner of a street-car transfer is not unreasonable and oppressive by reason of the generality of its terms, since the letter of a penal statute is not controlling, but will be given a liberal and equitable construction, making it apply according to its spirit to an act in its nature illegal or fraudulent, and no lawful or innocent use of the transfer will subject a passenger to the penalties of the ordinance.

James G. Maguire and Frederick McGregor, for the petitioner.

Frank Kelly and F. P. Dunne, for I. F. Lees, the respondent.

433 HENSHAW, J. The petitioner was convicted of the violation of a penal ordinance in the city and county of San Francisco. He sued out this writ of habeas corpus, alleging that the ordinance under which he was convicted and sentenced is void. The ordinance in question is as follows:

“Order No. 2992.

“Providing regulations in the operation of street railroads and prohibiting the issuance or delivery of transfers to passengers except upon or within the car from which the passenger is transferred.

434 “The people of the city and county of San Francisco do ordain as follows:

“1. Every person, firm, and corporation operating street-cars within the city and county of San Francisco that issue transfers to passengers to enable them to transfer to other cars operated by the same or different owner, shall issue and deliver said transfers upon or within the car from which the passenger is transferred, and not elsewhere.

“2. Every person, firm, and corporation operating street-cars within the city and county of San Francisco that receives transfers as fare from passengers shall take said transfers from the

passengers who received the same within or upon the car to which the passengers are transferred, and not elsewhere.

"3. No person, except a duly authorized conductor, or agent of a person, firm, or corporation operating a line of street railroad within the city and county of San Francisco, shall within said city and county issue, deliver, give, or sell, or offer to issue, deliver, give, or sell, to any other person whatsoever, any transfer, transfer check, or ticket, issued or purporting to be issued by such person, firm, or corporation so operating such line of street railroad, for passage on any street railroad car or line.

"4. Every person, firm, or corporation violating the provisions of this order shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Lorenzen was charged with having given and disposed of a transfer in violation of section 3 of the ordinance.

Against the validity of this ordinance it is urged that it violates the guaranty of personal liberty contained in the constitution of the United States and of the state of California (U. S. Const., amend. 14, sec. 1; Const., art. 1, sec. 1); that it is an unconstitutional interference with a right of private property; that it is arbitrary, oppressive, and unreasonable; and, finally, that it is an illegal attempt to enforce the obligations or assumed obligations of private civil contracts by penal legislation.

As to the nature of the "transfer," it is well recognized and admitted that the street railroads of the city and county of San Francisco have provided that passengers upon their cars who have paid the usual fare may receive transfers entitling them to leave the car at a certain designated point, and there within a limited time and without further payment of fare, but upon presentation and delivery of the transfer check, pursue their travels upon the connecting line. It is, then, a part of the passenger's contract with the company that he may thus transfer to and ride upon the connecting road. As conditions of this privilege, it is further a part of the contract that the passenger shall board the cars of the connecting line at a designated point, and within a time limited after the issuance to him of the transfer indicated by a punch mark upon its face, and that the transfer shall not be transferable or assignable to another, but if used at all, shall be used by the person to whom it is issued. The paper slip or ticket designated a transfer, when

in the hands of the passenger, thus serves a twofold purpose: 1. To the passenger as an evidence of his contract by which he is entitled to continue his journey upon the connecting road; and 2. To the company as a means of identification afforded to its conductors and servants by which they may know that the passenger presenting the transfer is entitled to ride without further payment of fare.

Such being the nature of the contract between the company and its passenger, consideration may be paid to the objections raised against the validity of this ordinance. The power of the general legislature acting within constitutional limitations to make penal an act theretofore indifferent, or even innocent, may not be doubted: *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610. This, however, is not a statute of the general legislature, but a municipal by-law, and while it is true that article 11, section 11, of the constitution of this state expressly confers upon a city the power to make and enforce within its limits "all such local, police, sanitary, and other regulations as are not in conflict with general laws," this language is not to be construed as enlarging the powers which municipalities theretofore enjoyed in these respects; but it is merely an express grant of a power which formerly they possessed by implication: *People v. Newman*, 96 Cal. 607, 31 Pac. 564. The ordinance in question, then, is to be scanned and judged like any other municipal ordinance. So ⁴³⁶ judging it, regard is to be had to the end sought to be accomplished—whether that end be a reasonable one, and one within the powers of the municipality to accomplish; and regard is also to be had to the question whether the mode adopted to accomplish the end is itself reasonable or unreasonable.

Street-car companies are public utilities, which are almost necessities to our present mode of life. While in one aspect their ownership is private, and they are operated for private gain, in another they are servants of the people, and the law-making powers reserve and freely exercise the right to regulate and control them in their operations. It is upon the theory, and only upon the theory, that they may be operated for the public good that a franchise permitting their existence may be given; and the power to pass reasonable regulations for their operation and management is expressly granted by section 503 of our Civil Code. It is strictly within the power of the municipal authorities of the city, and properly within the exercise of their duties, to pass any reasonable regulations affecting street-

car lines, to remedy a threatened or actual interference with the comfort, convenience, and general welfare of the traveling public. It is urged against this ordinance that it is an attempt by penal legislation to enforce a private civil contract; in other words, that it is an attempt to compel the passenger who has received his transfer to use it within the limits of his contract, and not to violate that contract by giving it to a person who may make improper use of it. Could it be perceived that this was the only purpose, or even the main purpose, of the ordinance in question, we should be inclined to hold that the objection was fatal; but we cannot perceive that its main object or design was to accomplish this result. Rather, we think it clear that its primary object is to protect and advance the convenience and welfare of the traveling public. For if to the legislative mind an abuse of the transfer system has grown up, the inevitable result of such unrestricted abuse must be one of two things—either that transfers would be discontinued entirely, to the material injury of the community, or the transfer system would be hedged and safeguarded by onerous conditions and requirements for the protection of the company, which would work great inconvenience to the passengers. It was certainly right for the supervisors, if ⁴³⁷ they saw or anticipated the existence of such an evil, to destroy or avert it by proper legislation tending to correct the abuse, and it is no objection to the validity of an ordinance designed for this purpose that it may incidentally tend to prevent frauds and compel men honestly to abide by their contracts. It is concluded, therefore, upon this point that the purpose of the legislation, to promote the convenience and welfare of the traveling public in regulating the business of the street-car companies of San Francisco in their dealings with their passengers, is legitimate and within the scope of the powers expressly granted to the municipal authorities.

But are the means adopted to accomplish this end unreasonable or oppressive, or in violation of any constitutional rights of the citizen? It is here first insisted by petitioner that the transfer issued to him by the company is his property, and that an essential and inalienable right to the enjoyment of property is the right to sell, give it away, or otherwise dispose of it. This, however, is but partially true. A man may not be deprived of his property or of his property rights for any private considerations whatever, nor for considerations of public good, without compensation first made; but the legislature has the unques-

tioned right, and every day exercises it, of restricting the use to which private property may be put. As is said in *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 36 N. E. 948: "The franchises of railroads acting under charters or acts of incorporation are of a public nature so far as the safety, convenience, and comfort of passengers are concerned. The reasonable regulations affecting the conduct of such public employments are fit subjects for legislative action. The law-making power may provide means for remedying such evils as in its opinion may exist in the management of these public agencies of transportation, and in doing so it may sometimes impose restrictions which are deemed to be necessary upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property whose use and enjoyment are so limited is invested in a business affected with a public use, or used as an accessory in carrying on such business." 438 But, aside from this, in the case of this ordinance it cannot be perceived that its terms limit or circumscribe any of the just and legal rights which a passenger receiving a transfer theretofore enjoyed. In receiving it he took it under the conditions above set forth. It was a part of his contract that, if used, he alone would use it, and if he sold it or assigned it, or gave it to another, to the end that that other might use it, he clearly violated his contract, and put a fraud upon the company. A court will not hear with much patience one insisting upon his right to violate his contract and consummate a fraud. The ordinance in question, therefore, so far as the passenger is concerned, leaves him all the rights which theretofore he enjoyed under his contract, and interferes in no way with any legal or legitimate use which at any time he could have made of the transfer. At the most, so far as he is concerned, it has but made penal what before was illegal and against good morals.

Finally, it is urged against the ordinance that by the generality of its terms it is unreasonable and oppressive; that every person who, taking a transfer, shall hand it to anyone other than the person authorized to receive it, no matter how innocent the act may have been in fact or intent, is guilty of a misdemeanor. In illustration of the position it is said that if the conductor should give to the father traveling with his family three or four transfers, and he in turn should hand them over

to his wife and children, he would at once become amenable to the ordinance; that so, too, would be the passenger who handed his transfer to another upon the car to be delivered to the conductor; so, too, would the witness in court who gave the transfer to the judge for inspection, or the judge who in turn might deliver it to the clerk. To some of the objections thus presented answer may be made that the life of the transfer ends with the passage of the time indicated upon its face. It ceases then to be a transfer, to have any value at all other than that which may attach to it as a bit of paper. But for the more substantial objection that the ordinance by its terms would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided ⁴³⁹ in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope. The rule was thus early expressed in Bacon's Abridgment: "A statute ought sometimes to have such an equitable construction as is contrary to the letter." The oft-cited instance of the Bologna law, which enacted that whoever drew blood in the streets should be punished with the utmost severity, was wisely held not to apply to the barber who opened the veins of a sick man to aid in his cure. The statute of Edward II, declaring guilty of a felony any person who broke prison, was held upon considerations of the most ordinary common sense not to apply to one who did so to escape from a burning jail. The law declaring it a felony to lay hands upon a priest, by the same principles of common sense reasoning, was held not to apply to one who did so by way of kindness or warning, but only to those who acted with illegal or improper intent. In *United States v. Kirby*, 7 Wall. 482, the act provided: "That if any persons shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, etc., . . . for every such offense shall pay a fine not exceeding one thousand dollars." A mail carrier was arrested by a state officer on an indictment for murder. The act came within the letter of the law. Mr. Justice Field, delivering the opinion of the court, discusses the exemption of mail carriers from detention under civil process, but declares that they are liable to arrest and detention under criminal process for acts

malum in se. Therefore, notwithstanding the fact the defendant had "knowingly and willfully" retarded the mail carrier, it is said: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been the primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mail unavoidably follows. . . . All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the legislature intended exceptions ⁴⁴⁰ to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." In *Donnell v. State*, 2 Ind. 658, a statute prohibiting the retailing of spirituous liquors without license contained no exception in favor of a druggist selling for medicinal purposes. A druggist who had so sold liquor was discharged after conviction as being clearly excepted from the intent, though not the letter, of the law. In *State v. Clark*, 29 N. J. L. 96, the statute made it a misdemeanor for anyone to willfully open, break down, injure, or destroy any fence. It was held not to apply to the destruction of a fence by one who was in its lawful possession, and it is said that the literal import of the terms and phrases implied will be controlled by the objects which the act was designed to reach. In *Holmes v. Paris*, 75 Me. 559, it is said: "It has been repeatedly asserted in both ancient and modern cases that judges may in some cases decide upon a statute even in direct contravention of its terms." In all of these cases the apparent defect of the statute is cured by making it apply according to its spirit to the act in its nature illegal or fraudulent. So here, notwithstanding the generality of the language, no lawful or innocent use of the transfer would subject the passenger to the penalties of the ordinance.

It is concluded, therefore, that the ordinance is valid and the prisoner is remanded.

Temple, J., McFarland, J., and Beatty, C. J., concurred.

Van Dyke, J., dissented.

MR. JUSTICE GAROUTTE dissented from the conclusion reached, and from the construction of the ordinance as shown by the closing portion of the opinion to the effect that the defect, due to the generality of its language, "is cured by making it apply accord-

ing to its spirit to the act in its nature illegal or fraudulent." While the ordinance itself makes all persons guilty other than some agent of the company, the prevailing opinion says no innocent or lawful use of the transfer would make a passenger guilty. "In other words, as construed by the opinion, the ordinance reads that any passenger 'who gives away or sells a transfer with intent that it shall be used by some other party is guilty of a misdemeanor.' An ordinance so framed appears to me to be perfectly valid, but this court has no right to frame such an ordinance, even by construction. An ordinance of that kind would be entirely dissimilar to the one passed by the board of supervisors. In such an ordinance this particular intent becomes the very heart of the act, overshadowing everything else. . . . We only know what the intention of the board of supervisors was from what it did, and this court can only measure and test this act by what it says." A complaint worded in the language of the ordinance would charge no offense. In commenting on the Bologna case, the justice shows that a statute framed in such general language would not be valid for any purpose under our system of jurisprudence, and he adds: "In the days when the Bologna case was decided, in that and similar jurisdictions, such a thing as the invalidity of a law was not known. The power that made the law was supreme. Things in these days and in this country are not as they were in those days and in those countries." The Indiana case cited is opposed to *Commonwealth v. Kimball*, 24 Pick. 370, and there is nothing in the case of *United States v. Kirby*, 7 Wall. 482, which supports the construction given the ordinance in this case. Justice Garoutte cites other penal statutes to show that a court cannot with safety inject into a penal statute or ordinance a particular intent, for the reason that it cannot know what intent the legislature had in mind.

LEGISLATURE—POWER TO MAKE ACT CRIMINAL.—It is no objection to a statute prohibiting a particular act and making its commission a public offense that the prohibited act was, before the statute, lawful or even innocent, and without moral turpitude: *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610. But a statute declaring that to be a crime which consists alone in the exercise of a constitutional right is void: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781. See, further, the monographic note to *Booth v. People*, 78 Am. St. Rep. 235-274.

PIERCE v. MERRILL.

[128 Cal. 464, 61 Pac. 64.]

GUARANTY—NOTE SECURED BY MORTGAGE—STATUTE OF LIMITATIONS.—A guaranty of the payment of a loan to a corporation secured by a note and mortgage, with interest thereon at the times and according to the terms expressed in such note and mortgage, is an absolute and unconditional one, and a breach thereof occurred when the note mentioned therein fell due and remained unpaid. Hence an action upon the guaranty is barred by the statute of limitations at the expiration of four years thereafter.

DEBTOR AND CREDITOR—CLAIM SECURED BY TWO OBLIGATIONS—ACTION.—A creditor whose claim is secured by two written obligations, one of which is secured by a second mortgage, the other by a pledge of shares of corporate stock, and both of which fall due simultaneously, has a right to proceed at once thereafter upon either or both of them to enforce payment of the amount due.

GUARANTY—ABSOLUTE AND CONDITIONAL PAYMENT.—An absolute guaranty of payment differs from a conditional guaranty against loss as the result of nonpayment of a debt in this, that in the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, while in the second the contract is in the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor.

GUARANTY—REQUEST TO POSTPONE FORECLOSURE SALE.—The request of a guarantor to postpone a foreclosure sale in a suit to foreclose a mortgage given to secure the guaranteed debt, made more than four years after the note and guaranty fell due, does not affect the right of such guarantor to urge that the guaranty was unconditional and was barred by the statute of limitations.

CONTRACTS — CONSTRUCTION — UNAMBIGUOUS TERMS.—It is only in relation to contracts that are uncertain and ambiguous that the conduct of the parties is to be looked to in aid of construction, and where the terms are plain and certain, the court will construe the intention of the parties to have been in accordance with their agreement.

PLEADING—STATUTE OF LIMITATIONS—AVOIDANCE OF.—A plaintiff who relies upon a written acknowledgment of indebtedness, or upon any other fact, to take the case out of the statute of limitations, must plead it in his complaint.

Shortridge, Beatty & Brittain and F. P. Flint, for the appellants.

E. S. Pillsbury and Alfred Sutro, for the respondents.

466 GRAY, C. This is an appeal of the defendants Bonebrake and Howes from a judgment in favor of plaintiffs for twenty-one thousand four hundred and fifty-eight dollars and

ninety-seven cents and costs, and from an order denying defendant's motion for a new trial.

The action was brought to recover on a written guaranty, in words and figures as follows:

"Los Angeles, Cal., June 10, 1889.

"To Henry Pierce, Emily F. Pope, and W. H. Talbot, Trustee,
San Francisco, California:

"In consideration of your making a loan to the Semi-Tropic Land and Water Company, a corporation, having its principal place of business at Rialto, San Bernardino, of the amount of \$50,000, and taking as security therefor a 2nd mortgage upon its property;

"And in consideration of your refraining from putting the same on record;

"We, the undersigned, guarantee the payment of the said loan, with interest thereon at the times and according to the terms expressed in said note and mortgage, and pledge herewith 467 (1,500) fifteen hundred shares of the capital stock of said company now standing in our names, in the following proportions: Sam'l Merrill, (600) six hundred shares; Geo. H. Bonebrake, (500) five hundred shares; and F. C. Howes, (400) four hundred shares; and we authorize the pledging of our further interest of (2-3) two-thirds of (10,000) ten thousand shares of said stock now in the treasury of said company.

"And, whereas, the said first parties have deposited with second parties the first above mentioned 1,500 shares of the capital stock of the Semi-Tropic Land and Water Company;

"Now, it is understood by and between all of the parties that upon payment of said note and satisfaction of said mortgage the said 1,500 shares of stock shall be redelivered to the said Merrill, Bonebrake, and Howes, in the proportions in which it has been delivered by them.

"Witness our hands and seals the day and the year first above written.

SAM'L MERRILL.

"GEO. H. BONEBRAKE.

"F. C. HOWES."

The complaint was filed January 31, 1896, and sets out a copy of the above guaranty and then proceeds as follows:

"That in consideration of said guaranty, and in reliance thereon, the plaintiffs did, on the twelfth day of June, 1889, loan to the said Semi-Tropic Land and Water Company the said sum of fifty thousand dollars, and that thereupon, and on said twelfth day of June, the said company made its promissory

note for fifty thousand dollars, payable to the plaintiffs on or before June 1, 1891, in United States gold coin, with interest at the rate of eight per cent per annum, payable quarterly, and to secure the payment thereof, according to its tenor, made, executed, and delivered to the plaintiffs a second mortgage upon its property, and which property was situated in the said county of San Bernardino. That thereupon the plaintiffs agreed to refrain, and did thereafter, pursuant to the terms of the said guaranty, always refrain from putting the said mortgage on record, and the said mortgage was never recorded.

"That at the same time with the execution and delivery of the said note and mortgage by the said company as aforesaid, and as a part of the same transaction, the defendants delivered ⁴⁶⁸ to the plaintiffs the said agreement and guaranty, and also then delivered to them in pledge, pursuant to the terms of said guaranty, and to secure the performance thereof, certificates for fifteen hundred shares of the capital stock of said Semi-Tropic Land and Water Company, whereof the defendant Samuel Merrill contributed six hundred shares, the defendant George H. Bonebrake five hundred shares, and the defendant F. C. Howes four hundred shares. That the said mortgage executed and delivered to the plaintiffs by the said Semi-Tropic Land and Water Company as aforesaid was a second mortgage upon the property described therein, and that the plaintiffs would not have loaned the said sum of fifty thousand dollars to the said company upon the security of the said second mortgage, and would not have refrained from recording the same but for the said guaranty, and that the plaintiffs loaned the said sum of fifty thousand dollars to the said company upon the security of the said second mortgage in reliance solely upon the said guaranty so as aforesaid delivered to them by the defendants."

The complaint then goes on to state that certain amounts were paid at various dates on account of the interest and principal of said promissory note, and that on January 25, 1894, plaintiffs brought an action against the said Semi-Tropic Land and Water Company to enforce the payment of the residue of said note and foreclose said mortgage, and such proceedings were had that on the eighth day of July, 1895, a decree was duly made and entered fixing the amount then due on said note at the sum of thirty-two thousand five hundred and seventy-three dollars and forty-four cents, and directing that the premises mortgaged be sold to satisfy that sum; that after a sale

and application of the proceeds thereof there remained a deficiency of some nineteen thousand and twenty-four dollars and eighty-five cents due on said note, and judgment for that sum was entered against said defendant therein; that an execution was issued thereon and returned wholly unsatisfied; that the said Semi-Tropic Land and Water Company has no property, is insolvent, and no part of said amount can be collected from it; and no part of the same has been paid. It is also alleged that defendants had notice of said foreclosure sale, and that the ⁴⁶⁹ same was once postponed for the period of four weeks at the instance and request of defendants. The prayer of the complaint is for judgment against defendants in the amount of said deficiency, together with interest and costs, and that said fifteen hundred shares of said stock be sold and the proceeds applied on said indebtedness, and that a judgment for any deficiency be entered against defendants.

The appellants demurred to said complaint, and, among other grounds, they pleaded the four year statute of limitations by reference to the provisions of sections 337 and 343 of the Code of Civil Procedure.

The demurrer was overruled, and in their answer, among other defenses, appellants again pleaded the four years statute of limitations. A trial was had, and plaintiffs had judgment as demanded in their complaint.

It will be seen from the complaint that this action was commenced about four years and seven months after the note guaranteed was due; and hence, if the residue of the note was due from defendants on the date on which they agreed in their guaranty it should be paid, the cause of action set out in the complaint was barred and the demurrer should have been sustained. But respondents contend that to the guaranty was attached the condition precedent that the security consisting of the second mortgage should be exhausted before the guarantors were liable for anything and before any action could be maintained against them, and that consequently the statute of limitations did not begin to run on the guaranty until the mortgage was foreclosed and the deficiency for which they were to be liable had been ascertained. We are of opinion, however, that the guaranty was absolute and unconditional, and that a breach thereof occurred, upon which to base an action, when the note therein mentioned fell due and remained unpaid: *London etc. Bank v. Smith*, 101 Cal. 415, 35 Pac. 1027; *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14; *Roberts v. Riddle*, 79 Pa. St. 469;

Klein v. Kern, 94 Tenn. 34, 28 S. W. 295; Huff v. Slife, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289; Shropshire v. Smith (Tex. Civ. App. 1896), 37 S. W. 174; Maxwell v. Capehart, 62 Minn. 377, 64 N. W. 927; Clay v. Edgerton, 19 Ohio St. 549, 2 Am. Rep. 422; Brown v. Curtiss, 2 N. Y. 225; Coburn v. Brooks, 78 Cal. 443, 21 Pac. 2; First Nat. Bank v. Babcock, 94 Cal. 96, 28 Am. St. Rep. 94, 29 Pac. 415.

470 "A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor": Civ. Code, sec. 2806. "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice": Civ. Code, sec. 2807. Whether or not the condition contended for attached to the guaranty is to be determined from the language of the contract: Adams v. Wallace, 119 Cal. 67, 51 Pac. 14. The guaranty is of payment at the times expressed in the note and mortgage. It does not follow because a part of the consideration of the guaranty was that the guarantees should take a second mortgage and refrain from recording the same, that it was also understood to be a condition to the liability of the guarantors that such mortgage should be foreclosed and a deficiency ascertained. The language of the contract does not import any such condition, but, on the contrary, negatives any presumption to that effect. To hold that payment was not to be made by defendants until after a foreclosure of the mortgage, would be to ignore their agreement, that payment should be made "at the times and according to the terms of said note and mortgage." The intention of the parties as it is to be derived from the language used is to control in the construction of a contract; and this rule applies to time of performance as well as to all other matters; and when the time of performance is expressed, as it is here, in plain, unambiguous terms, the court will not presume that some other time was intended. The plaintiffs here were in the position of creditors having their claim secured by two several written obligations, each of said obligations being also secured by a distinct lien, one of which consisted of the second mortgage and the other was on the hypothecated shares of stock. These obligations fell due simultaneously, and plaintiffs had a right to proceed at once thereafter upon either or both of them to enforce payment of the amount due.

It appears from the complaint that action could have been properly brought against the guarantors for the entire fifty

thousand dollars on the second day of June, 1891. More than four years after that date this action was begun, and it follows that the cause of action set out in the complaint was then barred by the statute of limitations, and the demurrer should have been sustained on that ground.

⁴⁷¹ Respondents, in support of their contention that the guaranty sued on is conditional, and that the guarantors were not liable until the mortgage security was exhausted, cite the following cases: Dutton v. Pyle, 195 Pa. St. 8, 45 Atl. 429; Cottrell v. New London Furniture Co., 94 Wis. 176, 68 N. W. 874; Burton v. Dewey, 4 Kan. App. 489, 46 Pac. 325; Bouche v. Louttit, 104 Cal. 230, 37 Pac. 902; Newell v. Fowler, 23 Barb. 628; Borden v. Gilbert, 13 Wis. 670; Kramph v. Hatz, 52 Pa. St. 525; Brainard v. Martin, 36 Vt. 614. Many other cases are cited by respondents; we have examined all of them and find that in none (except in some of the Pennsylvania cases which seem to be in irreconcilable conflict with others in the same state) was the guaranty one of payment, as in the case at bar. In most of them the contract was one of indemnity against loss, or that the claims were collectible; and in some it was expressly made a condition of liability that suit should first be brought against the principal obligor. In all these cases the guaranties are clearly conditional, but there is a clear distinction between them and the obligation under consideration in this case; as is well illustrated in the case of Burton v. Dewey, 4 Kan. App. 489, 46 Pac. 325, wherein it is said: "There is a well-understood difference between a guaranty of payment, and a contract of indemnity against loss as the result of the non-payment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second, the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor": See, also, Evans v. Bell, 45 Tex. 553, and Klein v. Kern, 94 Tenn. 34, 28 S. W. 295.

That defendants had notice of the proceedings in the foreclosure case and requested the postponement of the sale therein for four weeks, in no way affects their right to contend that the guaranty executed by them matured on June 1, 1891, and that the statute of limitations has run in their favor as to the contract on which the present suit is based. There was nothing in

this request of defendants which could have misled plaintiffs or which prevented them from suing on the guaranty before it was barred. Indeed, the request to postpone the sale was not ⁴⁷² made until after the right of recovery on the guaranty had expired by limitation, for the complaint shows that the judgment in the foreclosure suit was entered on July 8, 1895, more than four years after the note and guaranty fell due, and certainly no postponement of the sale could have been had until after entry of judgment.

It is only in relation to contracts that are uncertain, or of doubtful construction on their face, that the conduct of the parties is to be looked to in aid of construction. Where the terms are plain and certain, as they are in the contract here under consideration, the court will be guided by the language used and construe the intention of the parties to have been in accordance with their agreement: *Hawley v. Brumagin*, 33 Cal. 394. On the point here in controversy, which is the date of the maturity of the guaranty, the contract is so plain that there is no room for construction.

If plaintiffs relied upon a written acknowledgment of indebtedness within four years prior to the commencement of the action, or upon any other fact, to take the case out of the statute of limitations, they should have pleaded the same in their complaint. They did not do so, and, therefore, as the complaint stands it is clearly insufficient as against the demurrer based on the statute of limitations: *Sublette v. Tinney*, 9 Cal. 424; *Smith v. Richmond*, 19 Cal. 477; *Carpentier v. Oakland*, 30 Cal. 439, 444. Several other questions are discussed in the briefs, but inasmuch as the judgment must be reversed on the ground already discussed herein, and on a new trial these questions may not again arise, and because a disposition of them now would involve a discussion and consideration of the sufficiency of the evidence to justify the findings, and some objection is made to the sufficiency of the specifications of particulars, we deem it unnecessary to determine those questions on this appeal.

We advise that the judgment and order appealed from be reversed as to defendants Bonebrake and Howes, and the cause be remanded with directions to the court below to permit plaintiffs to file an amended complaint if they shall be so advised.

Haynes, C., and Cooper, C., concurred.

473 For the reasons given in the foregoing opinion the judgment and order appealed from are reversed as to defendants Bonebrake and Howes, and the cause is remanded with directions to the court below to permit plaintiffs to file an amended complaint.

Temple, J., Henshaw, J., McFarland, J.

GUARANTY OF NOTE.—One who, before maturity, guarantees the payment of a promissory note, becomes liable absolutely upon the default of the maker: *Huff v. Slife*, 25 Neb. 448, 13 Am. St. Rep. 497, 41 N. W. 289.

GUARANTY.—THE DISTINCTION BETWEEN a guaranty of payment and a guaranty of collection is, that the former is an absolute, unconditional undertaking on the part of the guarantor that the debtor will pay upon the maturity of the debt, while the latter is an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor: See the monographic note to *Fall v. Youmans*, 64 Am. St. Rep. 393.

GUARANTY.—THE STATUTE OF LIMITATIONS begins to run in favor of a guarantor from the time he is liable to suit: *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508.

PLEADING.—AN EXCEPTION TO THE BAR OF THE STATUTE of limitations must be taken advantage of by special plea and special replication: *Webster v. Newbold*, 41 Pa. St. 482, 82 Am. Dec. 487.

PIERCE v. MERRILL.

[128 Cal. 473, 61 Pac. 67.]

STATUTE OF LIMITATIONS — GUARANTY — REMOVAL OF BAR.—In an action on an absolute and unconditional guaranty, where the complaint shows on its face that the action is barred by the statute of limitations, a written admission of one of the guarantors of the existing indebtedness of the corporation, for which the guaranty was given, but which does not refer in any manner to the contract of guaranty, does not remove the bar of the statute.

STATUTE OF LIMITATIONS — REMOVAL OF BAR — WRITING.—A promise or acknowledgment relied upon to take a contract out of the statute of limitations must be in writing, and must be a direct, distinct, unqualified, and unconditional admission of the debt, which the party is liable and willing to pay.

Aylett R. Cotton, for the appellant.

E. S. Pillsbury and Alfred Sutro, for the respondents.

474 THE COURT. This is an appeal of defendant Merrill from an order denying his motion for a new trial.

Defendants Bonebrake and Howes appealed from the judgment as well as from an order denying a new trial, which ap-

peal was determined in S. F. No. 1351, 128 Cal. 464, ante, p. 56, 61 Pac. 64. In the opinion therein a copy of the guaranty hereinafter referred to is set out.

The action was commenced, as the complaint shows, on the thirty-first day of January, 1896, to recover on a written guaranty of the payment of a loan of fifty thousand dollars and interest thereon, at the times and according to the terms of a note and mortgage given by the Semi-Tropic Land and Water Company. The note and mortgage referred to in the guaranty provided for the payment of the entire amount mentioned, with interest, on or before June 1, 1891. The defendant and appellant herein, Merrill, made a separate answer to the complaint, in which he pleaded the statute of limitations, section 337 of the Code of Civil Procedure. A trial was had without a jury, and the court, among other findings, made the following: "That the cause of action set up in the complaint of plaintiffs herein is not barred as to said defendants, or either of them, by the provisions of section 337 of the Code of Civil Procedure of this state."

The evidence in the case showed the facts to be substantially as alleged in the complaint and as above set forth.

The principal contention of appellant is that the finding quoted above has no evidence to support it, and that the evidence proves directly the contrary thereof. This contention can be incorrect only on the theory that there was some evidence to show that the case stated in the complaint was in some way taken out of the operation of the statute of limitations. We have already held in *Pierce v. Merrill*, 128 Cal. 464, ante, p. 56, 61 Pac. 64, that the guaranty was absolute and unconditional, and that the complaint shows on its face that the cause of action therein stated is barred by the statute of limitations, and it must follow that evidence simply showing the truth of the allegations of the complaint would not support the quoted finding. Respondent contends, however, that there was evidence, consisting of a letter and telegram written and signed by appellant before the statute had run, and within less than four years prior ⁴⁷⁵ to the commencement of this action, to take the case out of the statute. The letter referred to reads as follows:

"Los Angeles, Cal., September 19, 1893.

"Orestes Pierce, Esq.

"Dear Sir: I have delayed answering yr. letter relative to the balance due you as taken from the Sather Banking Co.,

of some \$1,700, because of a contract to deliver to the Citrus Belt Irrigation Dist. 300 inches of water, and receive \$150 M bonds. I thought we could use a portion of these bonds in some way to wipe out all the company might owe you. There has been a delay in completing the title to the water, because the water stock was held by the San Francisco Savings Union, but they have agreed, upon a favorable report as to the legal status of the bond, to release their holdings and take some \$60 M bonds as collateral instead of the stock. This favorable report on bonds will be forwarded in two or three days, and then, by the action of the directors of the companies, all will be completed. There seems to be no hitch from any source to prevent the completion of the contract and receive the bonds. As soon as this is accomplished, either myself or some representative of the Semi-Tropic company will visit you and see if we cannot make some satisfactory arrangement with you.

“Very truly yours,

“SAMUEL MERRILL.”

The following is the telegram:

“San Bernardino, Cal., December 1st.

“Orestes Pierce, 728 Montgomery St., San Francisco.

“Make no assignment of our debt. Insist on payment. Must have my stock. Please send as soon as possible.

“S. MERRILL.”

From the reading of the letter we can discover no reference to the liability of the defendants in this case. In the sentence, “I thought we could use a portion of these bonds in some way to wipe out all the company might owe you,” the word “company” evidently alludes to the Semi-Tropic Company, a corporation of which this appellant had been, and perhaps was then, the president. The liability of defendants on the guaranty was distinct and separate from the liability of the corporation on the note and mortgage; and a declaration or acknowledgment ⁴⁷⁶ that might remove the bar of the statute from the latter would not, necessarily, have the same effect on the former obligation. We can discover nothing in the letter that signifies an acknowledgment of liability on the guaranty.

Under section 360 of the Code of Civil Procedure, the acknowledgment relied on to take the contract out of the statute of limitations “must be a direct, distinct, unqualified, and unconditional admission of the debt, which the party is liable and willing to pay”: *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Biddel v. Brizzolara*, 56 Cal. 374.

The telegram is not addressed to any of the plaintiffs, and we are unable to discover from the record before us that it has any reference whatever to the claim here in controversy. Our attention has not been called to anything, nor are we able to find anything, that would operate to take the contract out of the statute of limitations as to this appellant, or that would extend the time within which suit might be brought against him, to the date of the commencement of this action.

There is nothing in the eighth finding to take the case out of the operation of the statute. The promise or acknowledgment relied on for that purpose must be in writing: Code Civ. Proc., sec. 360; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225. The eighth finding makes no reference to any writing, and says nothing about any admission of this appellant as to any liability on the guaranty.

It is not necessary to determine whether or not the findings called in question, other than the one quoted, are justified by the evidence, because, if we admit the truth of everything stated in such finding, it would not answer the vital question on this appeal, to wit: Is the cause of action as to this appellant barred by the statute of limitations?

For the reason that there is no evidence to justify the finding above quoted the order appealed from is reversed.

LIMITATION OF ACTIONS.—An acknowledgment, sufficient to remove the bar of the statute of limitations, must contain a clear and unequivocal acknowledgment of the debt, a specification of the amount of it, or a reference to something by which the amount can be ascertained definitely and certainly, and an express or implied promise to pay: *Ward v. Jack*, 172 Pa. St. 416, 51 Am. St. Rep. 744, 33 Atl. 577; *Macrum v. Marshall*, 129 Pa. St. 506, 15 Am. St. Rep. 730, 18 Atl. 640. Nothing short of an unqualified written promise to pay will revive a debt against which the statute has run: *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737, 9 N. W. 71.

ESTATE OF WILLIAMS.

[128 Cal. 552, 61 Pac. 670.]

ESTATES OF DECEASED PERSONS—PROOF OF HEIRSHIP—DECLARATIONS OF DECEDENT.—At common law before the declarations of a deceased person could be admitted in evidence, in cases of pedigree, the relation of the declarant to the family must be established by other testimony.

ESTATES OF DECEDENTS.—IDENTITY OF PERSON IS PRESUMED FROM IDENTITY OF NAME. Hence the identity of a deceased declarant with the brother of the deceased testator named in the will is presumed from the identity of name.

EVIDENCE—IDENTITY OF PERSON—BURDEN OF PROOF.—THE PRESUMPTION arising from identity of name is rebuttable, but is sufficient to shift the burden of proof to the other side.

ESTATES OF DECEDENTS—DEATH OF LEGATEE—DECLARATIONS OF DECEDENT AS TO FAMILY UNDERSTANDING.—The fact that a residuary legatee died before the testator leaving no issue is sufficiently proved by the declarations of his deceased brother as to the family understanding and belief that such legatee enlisted in the war and was killed, and that he never married.

EVIDENCE—WEIGHT AND COMPETENCY—DECLARATIONS OF DECEDENTS.—THE OBJECTION that evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion goes to the weight that should be given such evidence, and not to its competency.

A. Boyer, for the appellant.

O. P. Evans, for the respondents.

553 HAYNES, C. Appeal from an order of distribution. James Williams died testate at the city and county of San Francisco, March 1, 1897, and his will was admitted to probate March 15, 1897, and letters testamentary were granted to appellant. Said will was made at San Francisco, February 28, 1897, in which, after some special bequests, the testator's brothers, George Williams and William Frederick Williams, were made residuary legatees.

The final account of the executor having been filed and settled, Clifford Oswin Williams and Frederick Percy Williams, a minor, by his guardian Arvilla S. Williams, filed their petition for final distribution on January 31, 1898, alleging that George Williams, one of said residuary legatees, died before said testator, unmarried, and without any lineal descendants, and that the other residuary legatee, William Frederick Williams, also died before the testator, leaving surviving him his widow, said Arvilla S. Williams, and said petitioners, Clifford Oswin and

Frederick Percy, but no other lineal descendants; that the testator was never married, and at the time of his death left no kin except said petitioners.

The executor answered said petition and put in issue all its material allegations.

The questions of fact to be determined were whether William Frederick Williams, the husband of Arvilla, and the father of the petitioners Clifford Oswin Williams and Frederick Percy Williams, was the brother of the testator and one of the residuary legatees named in the will, and whether George Williams, the other residuary legatee, was dead.

The will recited that the testator, James Williams, was born in Norwich, Chenango county, New York, that his father's ⁵⁵⁴ name was James Williams and that his mother's name was Harriet Luddington.

Arvilla S. Williams testified that she was married to William Frederick Williams at New Haven in 1875, and produced the certificate thereof, in which her husband was named "William F. Williams," and also produced the record of the baptism of her sons in which the father's name was stated as William F. Williams. She further testified that she learned from her husband that he was born in Norwich, Chenango county, New York, that his father's name was James Williams, that his mother's name was Harriet Luddington, and that he had four brothers and twin sisters.

At this point the attorney for the executor "objected to any testimony by witness as to what William F. Williams said to Arvilla S. Williams or her sons as hearsay and incompetent testimony to prove heirship." The objection was overruled, and an exception taken.

Appellant, in his brief, contends that before the declarations of a deceased person can be admitted, in cases of pedigree, the relation of the declarant to the family must be established by other testimony: Citing *Blackburn v. Crawfords*, 3 Wall. 187; *Thompson v. Woolf*, 8 Or. 463, and several English cases.

That such is the rule at common law is not doubted; nor is it necessary to consider whether sections 1852 and 1870 of the Code of Civil Procedure, or either of them, have changed the common law in that regard, since there was sufficient evidence to connect William Frederick Williams with the family to which the testator belonged, to justify the admission of his declarations made long before the execution of the will.

The will itself was sufficient evidence that James Williams, the testator, was born in Norwich, Chenango county, New York, that his father's name was James Williams, and his mother's Harriet Luddington, and that he had at least two brothers, named respectively William Frederick Williams and George Williams, who were made his residuary legatees. There was record evidence of the marriage of the witness Arvilla to William F. Williams, and it was entirely competent for her to testify that her husband so wrote his name, but that his full name was William Frederick Williams. The identity ⁵⁵⁵ of the name of the petitioners' father with that named in the will was prima facie proof that he was the William Frederick Williams named in it. Identity of person is presumed from identity of name: Code Civ. Proc., sec. 1963, subd. 25; *Douglas v. Dakin*, 46 Cal. 49; 16 Am. & Eng. Ency. of Law, 119, tit. "Name," "Identity," and cases cited.

The presumption arising from identity of name is, of course, rebuttable, but it is sufficient to shift the burden of proof to the other side. The question was one of fact, and there was certainly sufficient evidence to justify the court in finding that the petitioners were the nephews of the testator, and entitled to the whole of the residuary estate, if George Williams died before the testator leaving no issue. Upon this point the declarations of William Frederick Williams, deceased, as to the family understanding and belief, to the effect that he enlisted in the army, when a boy, on the Federal side of the Civil War, and was believed to have been killed, and that he never married, was competent evidence and sufficient to sustain the finding of the court: *Doe v. Griffin*, 15 East, 293. I quite agree with the learned counsel for appellant that evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency. That there was some testimony tending to contradict the testimony of the witnesses for the petitioner is conceded. Much of it, however, was incompetent, though not objected to; but it was for the trial court to determine the weight to be given to each and every particular statement, and I am satisfied with the correctness of its conclusions. The executor himself testified that he had exerted himself every way to ascertain who the relatives of the deceased were, and said: "I feel satisfied these two boys are the nephews of James Williams, but I should like to have it proven. I believe, from my investigations, George

Williams to be dead and left no family." I advise that the order appealed from be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

EVIDENCE.—IDENTITY OF NAME is prima facie evidence of identity of person: *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768, 3 South. 321. But see *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207.

EVIDENCE OF PEDIGREE.—Evidence of declarations of the members of a family as to pedigree are always admissible: Note to *Craufurd v. Blackburn*, 77 Am. Dec. 328. Declarations of a person since deceased as to relationship, descent, birth, or marriage are admissible when such matters are in controversy, and such declarations concern his family affairs: *Shorten v. Judd*, 56 Kan. 43, 54 Am. St. Rep. 587, 42 Pac. 337. The admission of such evidence, however, is restricted to the declarations of relatives: *Haddock v. Boston etc. R. R.*, 3 Allen, 298, 81 Am. Dec. 656; *Fowler v. Simpson*, 79 Tex. 611, 23 Am. St. Rep. 370, 15 S. W. 682.

TOY v. HASKELL.

[128 Cal. 558, 61 Pac. 89.]

ATTORNEY AND CLIENT—CONTROL OF ACTION—STIPULATION SIGNED BY PARTY.—A party must be heard in court through his attorney, when he has one, and the court has no authority to recognize anyone in the conduct or disposition of the case except the attorneys of record. Hence a judgment of dismissal entered upon a stipulation signed by the plaintiff alone should be set aside upon motion of the plaintiff's attorneys.

PRACTICE—WAIVER OF NOTICE OF MOTION.—The appearance of a defendant at the hearing of a motion to set aside a judgment of dismissal, and resting it on its merits, without any objection that no previous notice had been given, constitutes a waiver of the usual notice of motion.

PRACTICE—AFFIDAVIT OF MERITS—SETTING ASIDE JUDGMENT OF DISMISSAL.—A motion to set aside a judgment of dismissal, which was based upon a stipulation signed by one of the parties without the knowledge or consent of his attorneys, is a motion to set aside a judgment entered without authority of law, and requires no affidavit of merits.

Barna McKinne and A. F. Benjamin, for the appellant.

Carson & Savage, for the respondents.

559 GRAY, C. Appeal from an order denying plaintiff's motion to set aside a judgment of dismissal.

In the beginning of this case the plaintiff appeared by the attorneys whose names are signed to the complaint herein. Previous to the commencement of the action plaintiff entered into a written contract with said attorneys by which they were to have one-half of whatever might be recovered in the action as compensation for their services, said attorneys agreeing to ⁵⁶⁰ pay the necessary costs of the case. Thereafter, without any substitution or change as to his attorneys, and without their knowledge or consent, the plaintiff, in person, signed and delivered to defendant's attorneys a written stipulation prepared by them authorizing a dismissal of the case, and a judgment of dismissal was accordingly entered.

1. It is the law of this state, settled by repeated decisions, that a party must be heard in court through his attorney, when he has one, and the court has no power or authority of law to recognize anyone in the conduct or disposition of the case except the attorneys of record. So thoroughly has this question been canvassed that it is useless to do more than to cite some of the more important cases on the subject: *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Wylie v. Sierra Gold Co.*, 120 Cal. 485, 52 Pac. 802; *Mott v. Foster*, 45 Cal. 72; *Commissioners etc. San Jose v. Younger*, 29 Cal. 149, 87 Am. Dec. 164.

It should be borne in mind that the question here under consideration relates to the power of a party to control the course of the action in court; and the case, therefore, is to be distinguished from those which merely involve the right of a party to compromise, settle, and acknowledge satisfaction of the claim on which the action is based, and the effect of such a settlement as a defense to the action. Of this latter character is the case of *Hogan v. Black*, 66 Cal. 41, 4 Pac. 943, cited in respondent's brief: See *Theilman v. Superior Court*, 95 Cal. 224, 30 Pac. 193. We think the court erred in recognizing the stipulation signed only by the plaintiff, and should have corrected that error by granting plaintiff's subsequent motion, properly made through his attorneys, to set aside the judgment.

2. We think the record before us sufficient to present the questions discussed on this appeal. The bill of exceptions, to be sure, cannot be recommended as a model, but it appears on the second page thereof that one of the grounds of the motion to set aside the judgment of dismissal "will be that the attorneys for the plaintiff did not consent to or have any knowledge of the stipulation or agreement signed by the plaintiff for

said dismissal." The bill of exceptions shows that much of the evidence presented on the hearing was directed to the ground of the motion above quoted, and that some of the affidavits ⁵⁶¹ which are set out were "filed and read by the defendants on the hearing of said motion." It also appears that the motion was argued, submitted, and by the court denied. The appearance of the defendants at the hearing of the motion and their resisting it on its merits, without any objection that no previous notice had been given, was a waiver of the usual notice of motion. We cannot, therefore, uphold respondents' objection based on the insufficiency of the record.

3. Nor do we think that an affidavit of merits was necessary. The motion was not to open a default, but to set aside a judgment that had been entered without authority of law. The stipulation on which the judgment of dismissal was based was unauthorized, and the judgment was no better than it would have been if the court had arbitrarily dismissed the action without any stipulation or motion at all.

It is apparent, therefore, that the proceeding to set aside a judgment like this need not be in accordance with the provisions of section 473 of the Code of Civil Procedure, nor is it subject to the rules governing motions made to vacate judgments in pursuance of and for the reasons stated in that section. To be sure, one of the grounds of the motion stated was "inadvertence and surprise," but the motion should have been granted for the invalidity of the stipulation, and the other grounds stated may, therefore, be disregarded. That no affidavit of merits is necessary on a motion of this character is held in *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452, and in *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797.

For the foregoing reasons we advise that the order appealed from be reversed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

Van Dyke, J., Garoutte, J., Harrison, J.

ATTORNEY AND CLIENT—CONTROL OF ACTION.—An attorney regularly retained in a cause has very large, if not exclusive, power and authority in the management of the suit in all matters that affect the remedy merely, and not the cause of action itself. If a party to an action has an attorney of record, neither the party nor his attorney in fact has authority to sign a stipulation for

a continuance: See the monographic note to Board of Commrs. v. Younger, 87 Am. Dec. 166, 167.

JUDGMENT—VACATION OF.—AN AFFIDAVIT of merits is not essential to a motion to vacate a judgment if it appears that the court did not have jurisdiction to render it: Norton v. Atchison etc. R. R. Co., 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452. The sufficiency of affidavits in support of a motion to set aside a judgment, when required, is considered in Ratliff v. Baldwin, 29 Ind. 16, 92 Am. Dec. 330; Browning v. Roane, 9 Ark. 354, 50 Am. Dec. 218.

HIBERNIA SAVINGS AND LOAN SOCIETY v. CHURCHILL.

[128 Cal. 633, 61 Pac. 278.]

SUMMONS—ERRONEOUS DATE—EFFECT.—A date is no part of the form of a summons. Hence where a summons is in fact properly issued within the time allowed by law, the fact that it was erroneously dated a month prior to the commencement of the action is not conclusive proof that it was issued then, and it is not void.

INTERVENTION — FORECLOSING MORTGAGE — DEFAULT—DISMISSAL.—In an action to foreclose a mortgage, the heir of a deceased mortgagor may be refused leave to intervene after the default of the administratrix, and the dismissal of his complaint in intervention filed after such default is not an abuse of discretion.

INTERVENTION.—AS A GENERAL RULE, an intervention will not be allowed when it would retard the principal suit, or require a reopening of the case for further evidence, or delay the trial of the action, or change the position of the original parties.

INTERVENTION BEFORE TRIAL—DEFAULT.—Since an intervention must be made before the trial, a complaint in intervention is properly dismissed where it is filed after default has been made, because a default by which all of the issues tendered by the complaint are admitted in favor of the plaintiff is the equivalent of a trial when the case is litigated.

A. Boyer, for the appellants.

Tobin & Tobin, for the respondent.

634 McFARLAND, J. Action upon notes and mortgage executed to plaintiff by William H. Churchill in his lifetime. Judgment went for plaintiff. There are two appeals from the judgment—one by defendant Mary F. Churchill, administratrix, and the other by Robert P. Churchill, as intervenor. It is not contended by either appellant that the mortgage was not a perfectly valid one for the amount of money which it purports to secure; but it is contended that, for certain legal

reasons, technical in their nature, respondent should be precluded from enforcing its lien for the recovery of its loan.

1. The contention of appellant Mary F. Churchill is that the judgment is void because no summons was issued thereon within one year after the commencement of the action. The facts as to this contention are these: The action was commenced on March 5, 1898, and summons was issued on that day; it was served on the appellant Mary F. Churchill on February 15, 1899, and, as she made no response to the summons, her default was duly entered on March 10, 1899; but, when the clerk issued the summons on March 5, 1898, he inadvertently dated it "February" 5th, instead of "March" 5th. Afterward, appellant made a motion to vacate the default and dismiss the action, on ⁶³⁵ the ground that no summons had been issued and that more than a year had elapsed since the commencement of the action; and on the hearing of this motion the above facts appeared, and the court found them in the decree. The motion was properly denied. The whole contention of appellant rests on the proposition that the date of the summons on its face is conclusive proof that it was issued before the commencement of the action, and for that reason was void; and this proposition cannot be maintained. It was clearly shown that, as a fact, the summons was not issued before the commencement of the action, but that it was issued and served within a year thereafter. The summons was not void on account of its date; for a date is no part of the form of a summons prescribed by the code: Code Civ. Proc., sec. 407. The summons in the case at bar fully conformed to the requirements of the code. The appellant did not ask to be allowed to answer to the merits, or to answer at all. The judgment, as to this appellant, must be affirmed.

2. The other appellant—the intervenor, Robert P. Churchill—claims to be heir at law of the deceased mortgagor; and, after the administratrix had suffered default, as above stated, he obtained leave, ex parte, to file, and did file, what is called a "complaint in intervention," the prayer of which is that "plaintiff's complaint be dismissed." Afterward, on motion of respondent, his "complaint in intervention" was dismissed, and he appeals from this judgment of dismissal.

Respondent makes many points in support of the order of dismissal. It is argued that the intervention shows that appellant was not "joining the plaintiff in claiming what is sought by the complaint"; nor "uniting with the defendant in resist-

ing the claims of the plaintiff," because defendant by default had admitted all of plaintiff's claims; nor "demanding anything adversely to both the plaintiff and the defendant"; and that therefore, he is not within any of the provisions of section 387 of the Code of Civil Procedure. It is also argued that under section 1582 of the Code of Civil Procedure, and *Bayly v. Muehe*, 65 Cal. 348, 3 Pac. 467, 4 Pac. 486, *Monterey Co. v. Cushing*, 83 Cal. 512, 23 Pac. 700, *Collins v. Scott*, 100 Cal. 452, 34 Pac. 1085, and other decisions cited, respondent had the right to sue the administratrix alone, and that the ⁶³⁶ heir at law cannot intervene; and, further, that under any view the complaint in intervention does not state facts constituting any cause of action or defense. But waiving these questions, the appellant, under the facts above stated, had no absolute right to intervene; and, even assuming that the court, in its discretion, might have countenanced the intervention, notwithstanding the condition of the case, it certainly did not abuse its discretion. It is the general rule that an intervention will not be allowed when it would retard the principal suit, or require a reopening of the case for further evidence, or delay the trial of the action, or change the position of the original parties: *Van Gorden v. Ormsby*, 55 Iowa, 664, 8 N. W. 625; *Boyd v. Heine*, 41 La. Ann. 393, 6 South. 714; *Ragland v. Wisrock*, 61 Tex. 391; *Cahn v. Ford*, 42 La. Ann. 965, 8 South. 477; *Mayer v. Stahr*, 35 La. Ann. 57. In order to prevent the intrusion of strangers after the issues between the original parties have been determined, our code expressly provides that an intervention must be "before the trial"; and a default by which all of the issues tendered by the complaint are admitted in favor of plaintiff is the equivalent of a trial when the case is litigated. In *Henry v. Cass County Mill etc. Co.*, 42 Iowa, 33, it was held that there could be no intervention after an agreement for settlement between the original parties, although no judgment had been entered; and the court said: "The intervention must be made before the trial commences. After the verdict all would admit it would be too late to intervene. But the voluntary agreement of the parties stands in the place of a verdict, and, as between the parties to the record, as fully and finally determines the controversy as a verdict could do. . . . It is not the intention of the statute that one not a party to the record shall be allowed to intervene, and open up and renew a controversy which has been settled between the parties to the record, either by verdict or voluntary agreement."

The same principle applies where the controversy has been settled by default. And that a default is the equivalent of a trial when the case is litigated was expressly held in *McCallon v. Waterman*, 1 Flipp. 651, Fed. Cas. No. 8,675. The question there was as to the right to remove a case, after default, from a state to a federal court under a statute which provided for a removal "at any time before the trial or final hearing of the cause"; and it was held ⁶³⁷ that it could not be done. The court said: "A default has practically the same effect as a verdict. Until set aside, it is a final determination of the matters set up in the declaration. . . . The default, which is an admission of the plaintiff's case, stands in the place of a trial in a litigated case which is only a determination of the issues made by the pleadings of both parties."

The judgment is affirmed as to both appellants.

Henshaw, J., and Temple, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank

INTERVENTION.—An intervenor must make application before the trial of the cause; he must not delay the suit, and must accept it as he finds it: See the monographic note to *Brown v. Saul*, 16 Am. Dec. 179, 180. He cannot file a complaint after the defendant's default has been entered, and nothing remains to be done but to enter the judgment: *Safely v. Caldwell*, 17 Mont. 184, 52 Am. St. Rep. 693, 42 Pac. 766.

READY v. McDONALD.

[128 Cal. 663, 61 Pac. 272.]

STATUTE OF LIMITATIONS—ACCOUNT STATED.—If a balance due upon an account stated is afterward thrown into a new account stated, the first account is taken out of the statute of limitations.

STATUTE OF LIMITATIONS—ACCOUNT STATED—PLEADING.—If a complaint alleges an account stated which on its face is barred by the statute of limitations, but a subsequent allegation shows that this account was carried into and became an item in a second account stated which is not barred by the statute of limitations, and the prayer of the complaint is for the amount of the second account stated, the cause of action is based upon the second account and a demurrer is properly overruled.

STATUTE OF LIMITATIONS.—FINDINGS are sufficient if the truth or falsity of each material allegation in issue can be demonstrated therefrom. Hence a finding that a second account stated included the amount due in a first account stated is a finding that the action is not barred by the statute of limitations.

Graves & Graves, for the appellant.

W. H. Spencer, for the respondent.

664 COOPER, C. Appeal from judgment and order denying new trial. The appellant urges two assignments of error: 1. That the court should have sustained the demurrer to the first cause of action set forth in the complaint; and 2. That the court failed to find on the plea of the statute of limitations. The complaint contains what purports to be three causes of action: 1. A balance due upon a stated account of May 2, 1895, for the sum of two hundred and thirty-seven dollars and fifteen cents; 2. A balance due upon a stated account of January 2, 1897, for the sum of three hundred and twenty-six dollars and twenty-five cents; 3. For twenty-six dollars and twenty-seven cents for labor performed by plaintiff for defendant between January 2, and September 1, 1897.

If the first alleged cause of action were standing alone, it would appear upon its face to be barred by the statute of limitations, and the demurrer should have been sustained; but it was not intended by the pleader to be a cause of action, but a statement showing that the stated account of May 2, 1895, was carried into and became an item in the stated account of January 2, 1897. This is apparent by the way in which it is pleaded, and by the prayer of the complaint which is for the amount of the second and third causes of action, three hundred and fifty-two dollars and seventy-nine cents. The judgment was only for the amount named in the last two causes of action. The pleading is not a model, but when liberally viewed, with the intent to arrive at the intention of the pleader, it stated only two causes of action, and the demurrer was properly overruled. The item of two hundred and thirty-seven dollars and fifteen cents in the first account was not barred by the statute on January 2, 1897, and, therefore, properly became a part of the second account stated. The amount being due on the last-named date, and not barred by the statute, could be included in the last account stated in precisely the same manner as any other indebtedness. As said by Chief Justice North in an early 665 case (Farrington v. Lee, 1 Mod. 270): "If, after an account stated, upon a balance of it a sum appear due to either of the

parties, which sum is not paid, but is afterward thrown into a new account, it is now slipped out of the statute again": See *Auzerais v. Naglee*, 74 Cal. 68, 15 Pac. 371; *Angell on Limitations*, sec. 151.

The court did not find in direct language that the action was not barred by the statute, but it found facts which show that it was not so barred. It found that on January 1, 1897, there was an account stated in which was included the amount due in the account stated May 2, 1895. It was not necessary that the facts as found should be in any particular form or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with: *Clary v. Hazlitt*, 67 Cal. 289, 7 Pac. 701; *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 601, 14 Pac. 379.

We advise that the judgment and order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Van Dyke, J., McFarland, J.

LIMITATION OF ACTIONS—ACCOUNT.—If there are successive statements of an account, monthly or otherwise, and the balances are carried forward to the new account, each statement becomes a new point of departure under the statute of limitations. The balance is the beginning of a new account, and subsequent items not barred by statute will not relate to items antedating the statement so as to draw them out of the operation of the statute: See the monographic note to *Norton v. Larco*, 89 Am. Dec. 85.

ESTATE OF PORTER.

[129 Cal. 86, 61 Pac. 659.]

CONSTITUTIONAL LAW—ESTATES OF DECEDENTS—POWER OF THE LEGISLATURE TO AUTHORIZE THE SALE OF FOR THE BENEFIT, ADVANTAGE, OR BEST INTEREST OF THE ESTATE.—A statute authorizing the court to direct the sale of the real property of a decedent when it appears to be for the advantage, benefit, or best interest of the estate and those interested therein is constitutional, if applied only to the estates of persons dying after its enactment.

CONSTITUTIONAL LAW.—THE RIGHT OF AN HEIR TO INHERIT AN ESTATE, being itself the creature of the statute, is subject to the conditions imposed by statute, such as that the administrator may have a qualified possession and control under the

direction of the court for the purpose of paying the debts of the decedent and of selling property, if such sale should be shown to be to the advantage or benefit of the estate or of the persons interested therein.

W. F. Cowan, D. E. McKinlay, and C. H. Pond, for the appellant.

W. F. Fitzgerald, attorney general, and Tirey L. Ford, successor, for the respondent.

87 HAYNES, C. James Porter died intestate in the county of Sonoma in November, 1897, leaving an estate consisting of real and personal property, the latter being more than sufficient to pay all debts and liabilities of the estate and the costs and expenses of administration. He left, however, no known heirs, relatives, or other person who would be entitled to inherit his estate, and the court so found.

The court also found as follows: "That said real estate is expensive to properly maintain and manage; that a portion of the same is planted to vines which need the constant care and attention of some person qualified to attend to the same; that the remainder of said real estate required to be cultivated and the fruit trees growing thereon attended to; that the fences and buildings on said premises will become dilapidated unless properly attended to; that said real estate, by reason of its not being occupied by some person interested therein, will deteriorate and depreciate in value; that said real estate can be sold at the present time for a better price than if sold later; that it will be difficult to lease said premises for a fair compensation by reason of there being no dwelling-house thereon; that the expense of maintaining and caring for said premises by said administrator, if he is compelled to employ labor and help therefor, will largely exceed the revenues derived therefrom, and coupled with the taxes to be annually collected on said premises will be a source of expense which will be a disadvantage to the parties entitled to said estate."

As a conclusion of law the court found that it had no jurisdiction to make the order prayed for, and denied the petition, and from that order this appeal is taken.

The court placed its refusal to grant the order upon the ground that the following provision found in section 1536 of the Code of Civil Procedure is unconstitutional: "Or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those in-

terested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court."

⁸⁸ The portion of said section above quoted was inserted therein by an amendment approved March 23, 1893. Prior to said amendment property of the estate was authorized to be sold for the payment of the family allowance, or debts due from the decedent, expenses of administration, or payment of legacies.

It is said the court below relied principally upon the case of *Brenham v. Story*, 39 Cal. 179, to justify its conclusion that it had no jurisdiction to make the order prayed for. That case arose under a special act of the legislature passed in 1861 (Stats. 1861, p. 152), after the death of Charles White, authorizing his administrator to sell any portion of the real estate held, claimed, or owned by White at the time of his death, as in the judgment of the administrator would best promote the interests of those entitled to said estate; and said act was held invalid upon the ground that the title to the property had vested in the heirs before the passage of the act, subject only to the power of the court to order a sale for the purposes specified by the statute in force at the time of White's death. The distinction, however, between that case and this lies mainly in the fact that here the amendment of 1893 was in force before the death of Porter, and therefore the estate vested in the heir, if any he had, subject to the exercise of the power given to the court by the amended statute. This amended statute has heretofore been called to the attention of this court in but one case, so far as I am aware, namely, in *Estate of Packer*, 125 Cal. 396, 73 Am. St. Rep. 58, 58 Pac. 59. In that case *Brenham v. Story*, 39 Cal. 179, was followed because Packer died, while a resident of this state, before the said amendment of 1893 was enacted; and for that reason this court declined to consider whether said amendment was constitutional when applied to the property of persons dying after its passage, as that question did not arise. Here, the question is properly before us and must be decided.

It is a fundamental proposition that governments are formed, among other things, for the protection, not only of the rights of property, but of property itself; and its power to provide for the custody, care, and the descent and distribution of the property of intestates, real and personal, as well as the disposition of it by will, is unquestioned: *In re Wilmerding*, 117 Cal. 281, 284, 49 Pac. 181. It is true that under our statute upon the

death of the ⁸⁹ ancestor the property of the intestate at once vests in the heir; but it vests subject to conditions imposed by the statute, such as the qualified possession and control of the administrator, under the direction of the court, for its care, and its appropriation to the payment of the debts of the decedent, expenses of administration, and other liabilities enumerated in the statute; but the right of the heir to inherit the estate being itself the creature of the statute, there can be no question as to its power to impose these liabilities upon the estate, subject to which the property vests in the heir. That the administrator, under the control and direction of the court, is charged with the duty of preserving the property until final distribution cannot be doubted. He must, if there are funds, preserve the title to the real estate by the payment of taxes, and its value by making necessary repairs, and is entitled to receive the rents and profits until the estate is settled, and must "preserve it from damage, waste, and injury." So the administrator, under the order of the court, at any time after receiving letters may sell "perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept" (Code Civ. Proc., sec. 1522), whether there are debts or other liabilities to be paid or not; and this direction of the statute has no other basis than that of the preservation of the best interests of those in whom the statute vests the right of property, when it is not required to meet some charge imposed by law, and cannot be immediately delivered to the heir. So perishable property may be attached under a disputed contract liability, and be sold by order of the court before the defendant's liability is established.

These instances in which the state, by its statutes, disposes of private property are familiar and unchallenged, and are based upon the duty and power of the government to prevent injury by converting one kind of property into another for the benefit of the owner.

The statute before us involves no different principle, nor the exercise of any different power. We see no difference in principle between the sale of "personal property likely to depreciate in value, or which will incur loss or expense by being kept," and the sale of real estate under the facts found by the court in this case, nor any difference in the exercise of legislative power in ⁹⁰ the two cases. The statute under consideration divests no one of his property, but authorizes one's real estate to be transmuted into personal property under such circumstances that the consent of the owner, if capable of giving it, would be presumed.

The administration is in a condition to be closed if there were known heirs to whom it could be distributed. If none should appear, it will escheat to the state under the provisions of the Civil Code, sections 1404 to 1406. But in *People v. Roach*, 76 Cal. 294, 18 Pac. 407, it was held that a proceeding on behalf of the state, for the purpose of obtaining a decree that the estate had escheated to the state, is premature if commenced within five years after the death of the intestate. This estate must, therefore, remain in the hands of the administrator until such proceeding can be taken, unless within that time an heir capable of inheriting it should appear.

The order denying the petition should be reversed, with directions to the court below to amend its conclusions of law to conform to this opinion, and grant an order of sale as prayed for.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order denying the petition is reversed, with directions to the court below to amend its conclusions of law to conform to this opinion, and grant an order of sale as prayed for.

Henshaw, J., McFarland, J.,
Temple, J., Van Dyke, J.,
Harrison, J.

The Causes for Which the Legislature may Authorize the Sale of Real Property of Decedents.

The General Power to Sell the Real Estate of a Decedent exists only in cases where such power has been conferred by statute. At common law the real property of a decedent became vested in his heirs immediately on his death, and was not subject to sale for the payment of debts in the absence of a power to that effect contained in the will. In the absence of a will the power of an executor to sell real estate and of a court to order such sale are derived exclusively from legislation, and the acts must be within the scope of the legislative grant: *Wyman v. Campbell*, 6 Port. 219, 31 Am. Dec. 377; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *Currie v. Stewart*, 27 Miss. 52, 61 Am. Dec. 500; *Townsend v. Gordon*, 19 Cal. 189. The power is limited to the purposes enumerated by the statute, and a sale made under circumstances which the law does not recognize as warranting a sale is invalid: *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643. And the power to make a sale for any purpose terminates with the repeal of the law creating such right: *Bank of Hamilton v. Dudley*, 2 Pet. 492. And by such repeal the common-law rule is restored which limits the right to make a sale to a direction contained in the will: *Gay v. Grant*, 101 N. C. 206, 8 S. E. 99, 106; or where the land has been expressly charged with the payment

of debts: *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186. When a power to sell land is claimed under and by virtue of a statute, it must be clear that the terms of the statute cover the case. Hence where a statute provided that a debt due from an heir or legatee should be set off against and deducted from the claim or share of such heir or legatee, it was held not to apply to real property, and that, therefore, real property which descended to an heir could not be sold in order to pay a claim due the estate from such heir. This right of setoff was applicable only to personal property: *Jones v. Treadwell*, 169 Mass. 430, 48 N. E. 339. While the power to order a sale of a decedent's real estate is not regarded as one that pertains to the ordinary settlement of an estate, but is derived from statute and must be strictly followed: *Dorrance v. Raynsford*, 67 Conn. 1, 52 Am. St. Rep. 266, 34 Atl. 706; yet we think the general rule may be stated to be that the legislature can authorize the sale of a decedent's realty where it is necessary to satisfy some claim against it, or where the condition of the estate is such that a sale of the land is necessary or advantageous to the interests of those claiming it.

The Payment of Debts is the most common object for which statutes have been passed authorizing the sale of a decedent's real property. Legislative acts conferring this power exist in all of the states of the Union. No question as to their validity has probably ever arisen, for the power of the legislature to provide creditors with an appropriate remedy against the estate of a decedent has never been doubted. But it must be borne in mind that in order to render a sale of the decedent's estate proper, such estate must at his death have been burdened with the liability for his debts. Because if the property has descended to the heirs or devisees free from any liability, and their interests therein have become vested, a statute which purports to authorize a sale for the payment of the decedent's debts would deprive the heirs of their interest therein without due process of law, and would in effect be making them liable for the debts of their decedent. So far as the constitution of the United States is concerned, this was probably not true prior to the fourteenth amendment, since that constitution does not prohibit state legislation which divests vested rights, provided its effect is not to impair the obligation of contracts: *Satterlee v. Matthewson*, 2 Pet. 380; *Holman v. Bank of Norfolk*, 12 Ala. 369. In this last case it was said: "Nor is it any valid objection to the law that the title had descended to the heir before the passage of the act, as the legislature has the power, if it chooses to exercise it, of passing laws having a retrospective effect, although they operate on vested civil rights, provided they do not impair the obligation of contracts. The prohibition in the constitution of the United States and of this state against the passage of ex post facto laws applies only to laws passed for the punishment of crimes and the infliction of penalties." This case should, however, be read in the

light of its facts, and it appears clearly that the general law of the state made all the property of a decedent subject to the payment of his debts. Hence, the real property which descended to an heir or devisee did not vest in him absolutely, but it was subject to the payment of the debts of the former owner. The estate of the decedent being thus burdened with his debts at the time of his death, and the heirs taking it subject to such liability, a special statute passed after his death authorizing a sale of the real estate by a foreign administrator for the payment of debts was a legitimate and constitutional exercise of power. Indeed, most of the questions which have arisen relative to the power of a legislature to authorize a sale of a decedent's property for the payment of his debts will be found to have come from special and private acts passed subsequently to the decedent's death, and which provide for a sale in a specified manner, but the general laws of the state rendered such lands liable for the same debts. The policy of the law in this country has been from the earliest times to make a decedent's real property subject to the payment of his debts. Such being the prevailing policy of the law, the only problem is whether an act, either general or special, passed after a decedent's death, and which provides for a sale of the realty in a particular manner for the payment of debts, is unconstitutional as disturbing vested rights or as being an exercise of judicial power by the legislature. The particular mode of subjecting a debtor's property to the demands of a creditor to whom such property is liable must always depend on the wisdom of the legislature: *Bank of Hamilton v. Dudley*, 2 Pet. 492. Hence, where the legislature provides by a special act a particular mode of satisfying the debts of a decedent out of his realty by a sale thereof, the act is valid, for the property is already liable for the debts, and the particular procedure provided is immaterial. Thus, in *Shehan v. Barnett*, 6 T. B. Mon. 592, an act which took away the estate from the heirs and vested it in certain commissioners with power to sell for the payment of debts was deemed constitutional as merely providing an easier and simpler method of enforcing the rights of creditors in the real property which they had before. In sustaining the act the court said: "Lands have been subjected in this state to the payment of debts, of course; they are a fund of credit, under the eye of the contracting creditor, to which he looks for remuneration. The power of the legislature to subject lands to debts has never been questioned, and has been sanctioned by every department of government. . . . The estate in this case was liable, and pledged by the law to the creditors. It might have been reached by other modes of proceeding, more costly to the parties, and more dilatory, and not more safe. We, therefore, believe it competent for the legislature to apply this special remedy and subject the estate." A similar rule was established in *Cargile v. Fernald*, 63 Mo. 304, where during the lifetime of the decedent judgment had been obtained and execution issued under foreclosure

of a mortgage on his lands. The land being thus subject to liability, the legislature had authority to pass an act authorizing the administrator to sell the lands for the purpose of satisfying the debt. And the rule seems to be firmly established that where the general law recognizes the liability of a decedent's real property for his debts, the legislature may by special act after his death authorize the sale of such realty in a particular manner for the payment of his debts: *Kibby v. Chitwood*, 4 T. B. Mon. 91, 16 Am. Dec. 143; *Watkins v. Holman*, 16 Pet. 25. The act may provide for a private sale and need not require that notice shall be given to the heirs or to anyone: *Florentine v. Barton*, 2 Wall. 210. It is no objection that the act authorizes a sale of lands to pay debts contracted before its enactment. So far as the heirs are concerned, no contractual obligations are violated, and they are not in a position to raise this question. As to them the act merely affects the remedy, which the legislature has a right to do: *Sullivan v. Berry*, 83 Ky. 198, 4 Am. St. Rep. 147; *Fitzhugh v. Fitzhugh*, 6 B. Mon. 4. The legislature may sanction past sales of a decedent's realty in the same manner, where vested rights are not disturbed: *Leland v. Wilkinson*, 10 Pet. 294. A purchaser will ordinarily be protected, although the sale was not strictly in accord with the terms of a private statute under which it was held, where he had no knowledge of such statute, and the sale was properly conducted according to the provisions of the general law: *Browning v. Howard*, 19 Mich. 323. But where the statute authorizes a sale for the sole purpose of paying debts, a sale for some other purpose will be invalid and convey no title: *Davenport v. Young*, 16 Ill. 548, 63 Am. Dec. 320.

In passing a special act authorizing the sale of lands for the payment of debts, the legislature cannot exercise judicial powers, and if the act amounts to this it is invalid. Thus, where an act was passed authorizing a sale for the purpose of reimbursing the administrator for moneys he had advanced for the use of the estate, this amounted to an adjudication that a particular sum was due from the estate and was an unwarranted usurpation of judicial powers. "The act," said the court in *Lane v. Dorman*, 4 Ill. 238, 36 Am. Dec. 543, "directs the sale of the lands, and orders the appropriation of its proceeds to the persons ~~in~~ whose application and for whose benefit the act was adopted, and judges the costs to be paid out of the estate. If this is not the exercise of a power of inquiry into, and a determination of facts, between debtor and creditor, and that, too, *ex parte* and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to or hearing of the parties whose estate is diverted by the act." Undoubtedly, the power to determine the existence of debts is judicial and not legislative. Hence an assumption that debts are due and payable, and authorizing a sale of land, the proceeds to be used in paying such debts, is

unconstitutional. The legislature must provide for a judicial investigation to determine that debts are due: *Rozier v. Fagan*, 46 Ill. 404. But where the legislative act does not seek to determine the existence or amount of the debts, but merely authorizes a sale for the payment of debts, leaving the determination of the fact of indebtedness to the proper tribunals, the act is constitutional: *Watkins v. Holman*, 16 Pet. 25; *Wilkinson v. Leland*, 2 Pet. 627. Similarly, the legislature is acting within its powers when it authorizes a direct conveyance of the lands themselves in payment of debts, it being shown that a sale would not realize the required amount. The act, it seems, did not purport to determine the existence and amount of the debts: *Langdon v. Strong*, 2 Vt. 234. The sale itself the legislature may authorize to take place by other than judicial proceedings: *Clusky v. Burns*, 120 Mo. 567, 25 S. W. 585. But a statute which seeks to confirm prior sales is invalid in so far as it attempts to validate void judgments of probate courts: *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656. Legislation of the character of which we have been speaking, and which is generally upheld as valid, has been termed by Judge Cooley "prerogative remedial legislation": Cooley's Constitutional Limitations, 122. "It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal, on the application of the person representing his interest, and under such circumstances that the consent of the owner, if capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other."

Sale to Pay Legacies and for Division Among Heirs.—Certainly, where legacies are a charge upon the lands of a decedent, it is proper to authorize their sale for the payment of such legacies: *Probate Judge v. Kimball*, 12 N. H. 165. But the sale must clearly be for this purpose and no other: *Torrance v. Torrance*, 53 Pa. St. 505. In those states where special legislation is permitted, a special act which authorizes a sale of lands for the purpose of division among the heirs is constitutional. Such acts seem to have been frequent in earlier times, and in some states the courts refuse to consider the question of their constitutionality, as it would tend to unsettle land titles throughout the state, the title to an immense amount of real property depending solely upon their validity: *Watson v. Oates*, 58 Ala. 647; *Pettit v. Pettit*, 32 Ala. 288; *Hamlet v. Johnson*, 26 Ala. 557; *Wilson v. Matheson*, 17 Fla. 630. Such decisions have become a settled rule of property: *Feld v. Goldsby*, 28 Ala. 218, 65 Am. Dec. 341. The legislature may even authorize one who is not the executor or administrator to sell for the purpose of distribution: *Bruce v. Bradshaw*, 69 Ala. 360. It would seem to be always within the legislative power to authorize a sale of land for the purpose of division, where it is owned in common and cannot be otherwise equitably divided: *Metcalf v. Hoopingardner*, 45 Iowa, 510. The

right of partition is incident to all real estate which is held in common, the right of beneficial enjoyment being as essential as the right of ownership. Hence, where partition cannot be equitably made in any other way, an act which authorizes a sale of the property and a distribution of the proceeds is not unconstitutional as destroying vested rights, since it merely affords a reasonable remedy for the enjoyment of the property by partition: *Richardson v. Morison*, 23 Conn. 94. Under a general act which authorizes the sale of a decedent's realty, to insure a more equal division among the heirs, the application should be made by the heirs and not by the administrator: *Washington v. McCaughan*, 34 Miss. 304.

Authorizing Sale for Purpose of Holding or Investing Proceeds.—As already noticed with reference to statutes conferring power to sell real property for debts, the questions under this branch of the subject have mainly arisen under special and private legislative acts. There would seem to be no question about the power of the legislature to pass a general law, which would be applicable to future cases, providing that a decedent's lands which descend to his heirs or are devised to others could be sold and the proceeds invested for the benefit of the ultimate owners, providing there was any reason or necessity for the sale. There is one case in which the legislature may authorize the sale of an interest in a decedent's land and which will result in totally depriving him of such interest. This occurs in the case of devised lands upon which an estate tail is limited. In such a case the issue of a tenant in tail has no strict legal right in the entailed estate until after the death of the tenant in tail. His interest is but a naked possibility or mere expectancy, which the law does not regard as property in the ordinary sense. It is not a vested right beyond the legislative control, and the legislature, therefore, has full power to authorize the tenant in tail to convey the property in fee simple, and such conveyance will forever bar the right of the issue of such tenant: *Comstock v. Gay*, 51 Conn. 45; *De Mill v. Lockwood*, 3 Blatchf. 56; *Carroll v. Olmsted*, 16 Ohio, 251. Such a rule, manifestly, would not apply to vested estates.

The common case of legislative authority to sell lands and hold or invest the proceeds exists where a decedent's estate is held by an executor in trust for the ultimate owners or the beneficiaries. In such a case the problem is whether a special act can be passed authorizing the executor or administrator to sell the lands and hold or invest the proceeds for the benefit of those entitled. The interest of the beneficiaries, in most cases, became a vested one immediately upon the decedent's death, at which time there existed no law conferring a power of sale on the executor, or authorizing a probate court to order a sale of the lands for any purpose other than the payment of debts. The special act would, therefore, seem to violate vested property interests, which cannot ordinarily be done, and the act would be unconstitutional. Clearly, where there is no necessity for such a sale, and its only object is to convert the prop-

erty into money for the purposes of distribution, the special statute authorizing an administrator to make a sale would be unconstitutional and void, since the heirs are deprived of their property without due process of law: *Johnson v. Branch*, 9 S. Dak. 116, 62 Am. St. Rep. 857, 68 N. W. 173; *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124. This does not conflict with those cases where a partition of the property can be secured only by a sale and a division of the proceeds. In such case the paramount necessity for a sale is obvious. Such an act partakes of the nature of an arbitrary transfer of one's property to another. As said by Justice Story in *Wilkinson v. Leland*, 2 Pet. 627: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any state of the Union." While this general rule is unquestioned, and stamps as invalid any act passed after the death of a decedent which seeks to authorize a sale of his lands for purposes other than those recognized by the law at the time of his death, its application is limited. Without doubt, it applies to all cases where the heir or other beneficiary is an adult laboring under no disability. As applied to such persons, "the legislature has no power, arbitrarily and without the consent of an individual who is under no disability, to transfer his title to real estate to another, or to authorize some other person, not appointed by him, to make such transfer, and that the act in question, which attempted to effect such purpose, is void, and consequently no title passed to the grantee in the deed of the executor": *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124. The rule has been frequently applied to cases where the interest in the real estate which the executor was empowered to sell was vested in persons of full age, under no disability, and who object to the sale: *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499; *Hegarty's Appeal*, 75 Pa. St. 503; *Kneass' Appeal*, 31 Pa. St. 87. So long as a citizen is under no legal disability to act for himself in the management of his property, he is protected by the constitution from interference on the part of the state: *Gossom v. McFerran*, 79 Ky. 236. The case of *Linsley v. Hubbard*, 44 Conn. 109, 26 Am. Rep. 431, is in apparent conflict with this doctrine, and for this reason would seem to be of doubtful authority. There is nothing in this case to indicate that any of those who objected to the statute and to the sale were under disability; indeed, from the argument of counsel it appeared that they were all *sui juris*. A special act was passed upon the petition of the life tenant, to whom the land had been so devised, but against the objection of the remaindermen, authorizing a sale of the property and an investment of the proceeds for the interest of all those concerned. The act was held constitutional and valid, notwithstanding all those who owned an interest in remainder objected thereto. This case quotes with approval from *Sohier v. Massachusetts General Hospital*, 3 Cush. 483. But the vital difference between the two cases is that in the

Massachusetts case all of the parties interested in the estate united in a petition to the legislature to pass the particular act in question. The act, therefore, did not authorize the taking of property without the owner's consent. And *Rice v. Parkman*, 16 Mass. 326, also cited in *Linsley v. Hubbard*, 44 Conn. 109, 26 Am. Rep. 431, limits its application of the rule to cases of infants and others not capable of managing their own estates. In this case the court said: "This is a power frequently exercised by the legislature of this state since the adoption of the constitution, and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British parliament, on similar subjects, time out of mind. Indeed, it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere, to convert lands into money. For otherwise many minors might suffer, although having property, it not being in a condition to yield an income. This power must rest in the legislature in this commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves." But this case distinctly admits that this general power has no application to adults competent to manage their own property. In the case of persons *sui juris*, their own consent seems to be vital to the validity of legislation of this character, which authorizes a sale of their interest in the real property of a decedent: See, further, *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1479. We are not impressed with the force of the argument in *Sohier v. Massachusetts General Hospital*, 3 Cush. 483, adopted also in *Linsley v. Hubbard*, 44 Conn. 109, 26 Am. Rep. 431, that the sale of a person's land and investing the proceeds for his benefit is not depriving him of his property but is simply changing its form. While it may not strip him of his property in such a way as to leave him with nothing, it is certainly depriving him of the property he had. The argument is worthless to uphold the exercise of legislative power which authorizes a sale of an adult's interest in the real estate of a decedent against his will. As applied to infants and those under some legal disability, the legislature may certainly authorize the sale of their interest in a decedent's realty. But such power springs not from the fact that they are not deprived of their property, but that the legislature, as the general guardian and protector of those who are disabled to act for themselves, may protect their interests for them. Such power in the case of infants has been frequently acted upon. Thus, in *Kneass' Appeal*, 31 Pa. St. 87, an act of the assembly was declared constitutional which empowered executors to sell the real estate of one not *sui juris*, and to invest the proceeds upon the trusts declared in the will of the testator, on giving security for the faithful application of the fund. But the same case denied the existence of such a power where the parties were *sui juris*. Similar legislation was upheld in *Ervine's*

Appeal, 16 Pa. St. 256, 55 Am. Dec. 499; *Norris v. Clymer*, 2 Pa. St. 277; *Sergeant v. Kuhn*, 2 Pa. St. 393; *Williamson v. Williamson*, 3 Smedes & M. 715, 41 Am. Dec. 636. In *Clark v. Van Surlay*, 15 Wend. 436, where a decedent's property was left to one for life, remainder to his children, a private statute was held to be constitutional which authorized a sale of the property where it was necessary for the support and maintenance of the life tenant and his family and the education of his children. A similar statute was declared constitutional in *Towle v. Forney*, 4 Duer, 164. *Brenham v. Story*, 39 Cal. 179, in so far as it fails to recognize the power of the legislature to pass an act authorizing the sale of an infant's interest in the lands of a decedent, would seem to be opposed to the current of authority elsewhere. The suggestion in this case that the authorities which support such a legislative power have reference to the sale of an infant's lands by his guardian is not true with respect to all the cases heretofore cited in this note, since in some of them the power to sell has been conferred specifically upon executors and trustees: See, also, *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124. It is probable that where no necessity exists for the sale, and the parties interested will not be especially benefited thereby, that an act authorizing a sale will be an unwarranted interference with private property, even though the parties concerned are not sui juris: See *Powers v. Bergen*, 6 N. Y. 358. Where land was devised for church purposes, as, for example, a parsonage, if it is for the best interests of the church that it should be sold and the proceeds invested elsewhere for the same purpose, a private act of the legislature directed to this end will be constitutional: *Van Horne*, Petitioner, 18 R. I. 389, 28 Atl. 341. In *Solier v. Trinity Church*, 109 Mass. 1, the legislature exercised a similar power with respect to property devised in trust for religious purposes. But in *Saxton v. Mitchell*, 78 Pa. St. 479, where the decedent's property was devised subject to an easement therein for religious purposes, the legislature was denied the power to authorize a sale of the property and an investment of the proceeds elsewhere for the same purpose, against the objection of the heirs who were the owners of every other interest in the property.

Sale for Best Interests of the Estate.--The general rule enunciated by the principal case is undoubtedly the correct doctrine, namely, that a statute, which is in existence at the death of a decedent, is constitutional and valid, where it provides for the sale of such decedent's property when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interest of the estate and of those interested therein. A similar rule has been applied elsewhere: *Scales v. Curfman* (Tenn.), 53 S. W. 755. In *Poor v. Boyce*, 12 Tex. 440, a sale was upheld where the sole ground for selling was that there would be a great deal of litigation and expense necessary in order to recover the property for the estate. But in the absence of a general or special statute conferring such au-

thority, a probate court cannot order a sale for no other reason than that the property should, on account of its condition, be sold with advantage to the estate: *Gillenwaters v. Scott*, 62 Tex. 670. There can, however, be no doubt of the authority of the legislature to pass a general act authorizing a sale where it is necessary or advantageous to the best interests of the estate: See *Dorrance v. Raynsford*, 67 Conn. 1, 52 Am. St. Rep. 266, 34 Atl. 706. But there should be some valid reason which makes the sale necessary: See *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124; *Chandler v. Douglass*, 8 Blackf. 10, 44 Am. Dec. 732.

As is true of the other subdivisions of this subject which we have considered, the chief controversy occurs where acts have been passed after the death of the decedent and after the interest of the heirs has become vested. Is such an act valid? And can a sale of the decedent's real estate be authorized even though it be for the best interest of the estate and of all concerned? According to the principal case such an act cannot be passed, since its effect is to deprive the heirs of their property without due process of law. So far as concerns adults, and those competent to manage their own property, this is undoubtedly true. The rule in such case is precisely the same as it is in the cases already considered. So long as a citizen is under no legal disability to act for himself in the management of his property, he is protected from interference on the part of the state: *Gossom v. McFerrin*, 79 Ky. 236; *Brevoort v. Grace*, 53 N. Y. 245; *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124. Such a statute, as pointed out in this last case cited, is really an attempt to transfer by special act the property of a person not under disability, without his consent, to another person. But as we have noticed elsewhere, there would seem to be no objection to the passage of an act by the legislature authorizing a sale where adults either petition for the act or manifest their consent to it in some other manner. Such an act would seem to be valid even in the case of adults where their free consent is given to it. In addition to the cases heretofore cited, see *Brevoort v. Grace*, 53 N. Y. 245; *Culbertson v. Coleman*, 47 Wis. 193, 2 N. W. 124. As previously stated, *Linsley v. Hubbard*, 44 Conn. 109, 26 Am. Rep. 431, would seem to be of doubtful authority on this point, because such an act was sustained though it was passed in opposition to the wishes of adult heirs to the property. With reference to those laboring under the disability of infancy or of unsound mind, many special statutes have been passed authorizing the sale of their lands by the executor or trustee of the decedent's estate, and such acts have been upheld as constitutional and valid. Thus in *Chandler v. Douglass*, 8 Blackf. 10, 44 Am. Dec. 732, a special act authorizing the sale of a decedent's realty in which infant heirs were interested, so as to hasten its improvement and increase the value of the residue, and providing that the proceeds should be assets in the administrator's hands, to be disposed of according to law, was held to be valid. A special act of the legislature

authorizing the sale of the property of minors, to provide funds for their education and maintenance, is constitutional: *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Clark v. Van Surlay*, 15 Wend. 436; *Towle v. Forney*, 4 Duer, 164; *Leggett v. Hunter*, 19 N. Y. 445. These cases, while directed more to providing for the interests of the infants as persons rather than their estates, yet illustrate clearly the doctrine, as announced in *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570, that the legislature, as *parens patriae*, may prescribe such rules as it deems proper for the superintendence, management, and disposition of the property of infants, lunatics, and other incompetent persons. But such action must clearly be for the best interest of the infants and their estate. The power cannot be so extended as to authorize a transfer of property, except where it can legally be presumed that the owner would have assented to the transfer if in a situation to act for himself. In *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646, it was said that the power of the Maryland legislature to decree a sale of a minor's real estate in particular cases was undoubted. Such conversion of the realty into personalty was deemed not to deprive the minor of his property in any way, but simply changed its form. To the same effect see *Dorsey v. Gilbert*, 11 Gill & J. 87; *Brevoort v. Grace*, 53 N. Y. 245. The power of the legislature to authorize by special statute the sale of a minor's property for his benefit was, in *Munford v. Pearce*, 70 Ala. 452, considered so firmly settled as to constitute a rule of property, and could not be questioned.

The apparent doctrine of the principal case that no act can be passed subsequent to a decedent's death allowing an executor to sell the decedent's real property where it is necessary for the best interests of the estate would appear to be limited in most jurisdictions to the case of property the interest in which is vested in persons *sui juris*, but that the rule is otherwise in the case of infants or others laboring under legal disability.

STARR v. KREUZBERGER.

[129 Cal. 123, 61 Pac. 641.]

MASTER AND SERVANT—DEFECTS, DUTY OF INQUIRY RESPECTING.—An employé is not required to exercise any degree of care or diligence to discover defects. He will not be held to have assumed the risk of them unless he was actually informed of such defects, or they were so obvious that he must have known or simply refused to open his eyes and see; or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect.

MASTER AND SERVANT—OPPORTUNITY OF SERVANT TO DISCOVER RISKS OR DEFECTS.—The fact that a servant

has as good an opportunity as his master to know of defects involving risks does not necessarily charge him with contributory negligence, so as to preclude his recovery for injuries suffered through such defects. He has the right to rely on his master's inquiry, because it is the latter's duty to inquire, and the servant may assume that proper inquiry has been made by the master.

MASTER AND SERVANT.—The fact that an employé had two years before helped to construct a wall cannot be accepted as conclusively charging him with notice of its position and condition. He is not chargeable with contributory negligence because he acted upon his employer's assurance respecting the safety of proceeding with his work upon or about such wall.

PRACTICE—FINDINGS, WHEN NOT NECESSARILY CONTRADICTIONARY.—A finding that the plaintiff was ignorant of the unsafe condition of a wall, and a finding that he did not have a better opportunity than the defendant for seeing and knowing its condition, are not contradictory.

Holl & Dunn, for the appellants.

A. L. Shinn, A. P. Catlin, and Henry Starr, for the respondent.

124 CHIPMAN, C. Action by an employé against his employers to recover damages for personal injury claimed to have been sustained through their negligence. The defendants claimed that the injury was the result of plaintiff's carelessness. The cause was tried by the court and plaintiff had judgment. Defendants moved for a new trial, and the appeal is from the order denying the motion. Some objections are made to the findings as contradictory and argumentative, but the principal question argued is that the findings are not supported by the evidence.

The injury resulted from the falling of a brick wall on which plaintiff was working as a bricklayer. The findings challenged were: "Finding 3. That said brick wall was in an unsafe condition for the work for which plaintiff was employed and directed to perform, and which defendants knew, but of which plaintiff was ignorant. That while working, and through and by the negligence of the defendants in employing plaintiff upon said work and directing him in the manner of performing the same, and without fault or negligence on the part of the plaintiff, the said wall fell upon and injured plaintiff," etc. "Finding 4. That plaintiff did not have a better opportunity than the defendants of seeing and knowing the condition of said wall. That plaintiff was not guilty of carelessness or negligence in working upon said wall."

Plaintiff was a journeyman bricklayer of thirty years' experience. Defendants were partners and contractors for the work

125 being done, Kreuzberger being an experienced bricklayer and contractor, and Harvie a carpenter and contractor. The work was being done on a small brick building, part of the premises of the City Brewery in Sacramento, attached to the east side of the main brewery building. It was a one-story brick structure, with a brick gable front. The improvement consisted in raising the building an additional story and adding to the thickness of the wall by building a new four-inch wall of pressed brick from the ground, upon and against the entire front. The roof was first detached from the walls of the building and raised to the required height and supported there free from the walls. The new wall was to be tied or fastened to the old wall by cutting out two courses of brick across the front every two feet and inserting therein what were called "headers," or courses of brick, crosswise of the main wall, so as to connect the main with the new wall, and thus tie them together. These grooves were cut continuously across both buildings, as both were undergoing similar changes. We have to deal, however, with the smaller building and shall refer only to it. The walls of this building were originally twelve or fourteen inches thick from the ground up to the bottom of the ceiling joists, a distance twelve or fourteen feet. From this point a fire-wall extended upward "several feet above the bottom of the ceiling joists," and was eight or nine inches thick, resting on the twelve-inch wall. Upon this fire-wall was the front gable-end, of the same thickness as the fire-wall. Successive grooves were cut, and no question is made that this could be done safely in the thirteen-inch wall, but the last groove was cut about two inches below where the eight-inch fire-wall rested on the thirteen-inch wall, which undermined the fire-wall or gable-end, and it fell upon and injured plaintiff while he was at work. Appellants say in their brief: "It is not denied that cutting this last groove, four and one-half inches deep into the thirteen-inch wall, two inches below the point where the nine-inch wall commenced, caused the nine-inch gable-wall to fall; and the whole question is whether the plaintiff is free from negligence in cutting this groove."

It is conceded by both parties that there was no danger in cutting the grooves in the thirteen-inch wall, and all of them had been cut by direction of Kreuzberger as continuous grooves, **126** i. e., from end to end, without leaving any sections of the bricks in the grooves. There is evidence that where there is danger from the upper portion of the wall giving way when un-

dermined in this manner, the proper and safe course to pursue is to leave portions of the wall, at intervals, undisturbed, but in the thirteen-inch wall this, it is conceded, was not necessary, and no such precaution was taken. There were six workmen on the job and all were on the scaffold at the time the last groove was reached, and they had begun work on it when defendant Kreuzberger appeared.

Plaintiff testified that he was employed by defendant Kreuzberger and was working under his direction, as it appears were the other workmen also; at the time of the accident they were working on a scaffold nine or ten feet high, and they had carried up the four-inch wall about twelve feet; plaintiff was working at the east end of this wall or corner of the building, and on his left were the other workmen at intervals along the scaffold; the top of the brick wall at the corner was so high above the scaffold that plaintiff could not reach to the top. He testified: "I am not certain how high that thirteen-inch wall extended up. There was a fire-wall on the building. I did not know at that time how high the fire-wall was. There was nothing on the front of the building, where I was working, to indicate where the fire-wall commenced. Standing upon that platform where I was at work I could look up and see that the fire-wall was an eight-inch wall at the top. . . . At the time we were cutting the slot, just before the wall fell, we had built up the four-inch wall to where the course of stone was put on, and that would stop our work until the stone masons had completed theirs. Mr. Kreuzberger came to me and said that he did not see how we were going to continue the work there; that the stone masons were in the way. But he says, 'You can cut a slot through there for the next header, and then you and Corsaw go up to the Buffalo Brewery.' I said, 'Where will I cut?' He turned to the wall and said, 'Well, about here,' putting his finger on the wall. I looked up and said, 'Aren't we getting pretty high?' And he said, 'No, that's all right.' Then Corsaw, standing inside of me, said: 'Well, what's the matter with cutting under the header?' That would bring it two courses still lower ¹²⁷ than he first indicated. He said, 'All right; let it go at that, and have them all cut on the same line.' He left then and went toward Mr. Day's corner. . . . He came back and finally said, . . . 'Just cut that slot through, and you and Corsaw come up there, and the other boys will have to knock off.' He turned then and left again. We went to work and cut where he told us—that is, under the header." He then describes how

the work proceeded, and how as the last brick was knocked out of the groove the wall fell over on them.

Plaintiff was given a very searching cross-examination as to what he meant when he said to Kreuzberger, "Aren't we getting pretty high?" the purpose being to show that plaintiff was fully warned of the danger and knew as well as his employer did the exact conditions under which he was working. He testified: "The reason I asked him that question was to be sure that we were not cutting too high in that twelve-inch wall, so as not to cut into the eight-inch wall and through that wall. In other words, I wanted to be sure that we were not cutting too high. Q. In other words, you suspected you might be up where you might be cutting into the eight-inch wall? A. No, sir; if I had had the least suspicion of it I would not have cut there." Plaintiff was further pressed upon this point, and testified: "Q. Now, if you wanted to be certain, you had not been certain before that, had you? There was a doubt in your mind? A. Well, we had not cut there. No, there was not a doubt after he had given me the order. . . . I asked the question to be certain, and that is about the only way I can explain that. I asked that question in order to be certain that we were all right."

Further cross-examination developed the fact that plaintiff had, two years before, worked on the building and helped to lay the gable-wall. "From the fact, then, of seeing the wall, and from having constructed that wall, you knew exactly how it was constructed? A. At the time it was constructed, yes. Q. Knew as much about it as Mr. Kreuzberger did? A. No, sir; I don't think so. Because he was the boss there and looked after the work. He would look at it more particularly than I would."

128 He was asked what information Kreuzberger had that he, plaintiff, did not have, and answered: "Why, he was the contractor there. He had been up there and figured. He must have been up there and figured on the work that he was going to do." Witness Day, one of the bricklayers on the job, testified: "It could not be seen from the outside, where we were at work on the platform, where the eight-inch wall commenced. Mr. Kreuzberger came along the platform and pointed out the place to cut the groove. He indicated the course of bricks to be removed, and we cut out the course which he indicated. After the wall fell I examined it, and found that the wall broke off within one or two courses of brick from the point where the

eight-inch wall joined the twelve-inch wall." Hansen and Lynch, two other bricklayers who assisted in the work, testified that the groove was cut where Kreuzberger directed, and that they could not tell from the platform where the eight-inch wall joined the twelve-inch wall. Corsaw, who worked next to plaintiff, testified that they could not tell from the scaffold where the eight-inch wall commenced. "We would have to get a ladder and get up on top of the wall and measure the wall on the inside from the top down to the thirteen-inch wall where the eight-inch wall commenced, to ascertain that fact."

The architect, Mayo, testified: "A day or two before the gable end or fire-wall fell I told Lucas Kreuzberger [defendant] that that wall must be taken down. He knew that it had to come down, for the contract and specifications required that eight-inch wall to be taken down." Jackson, a laborer on the work, testified that Kreuzberger was on the top of the wall several times; that he, witness, had been ordered by the architect to take the gable wall down, "I was about to commence upon it when Mr. Kreuzberger came along and ordered me not to do it. I asked Mr. Kreuzberger who was boss of this work, and he said he was, but he must humor Mayo a little. He said he would save money by not taking the wall down." There is nothing in the evidence to warrant the inference that the architect ordered the wall taken down because of any fear that it might fall; the significance of this evidence lies in its tendency to prove that Kreuzberger knew all about the wall, and in tending to give rise to a further inference that in his endeavor to ¹²⁹ avoid taking the wall down he was not as mindful of his servant's safety as it was his duty to be as a master, or as he otherwise would have been. The evidence is given with considerable fullness because of defendants' very earnest contention that the court drew erroneous deductions from it, and because it is seriously contended that under well-settled rules of law the evidence shows that plaintiff contributed to his injury by his own negligence and should not recover.

Appellants cite numerous cases, from which they deduce the following: "The doctrine established by these cases is that an employé engaged upon work that is dangerous, or using defective appliances or machinery, or working upon dangerous or insecure scaffolding, cannot recover damages for any injuries received through such defects, provided he knew, or had the means of knowing, the dangerous condition of such machinery or appliances; nor can he recover if his means of discovery of the

defects and dangerous condition is as good as that of his employer." In the case of *Silveira v. Iversen*, 128 Cal. 187, 60 Pac. 687, reference was made to *Magee v. North Pac. Coast R. R.*, 78 Cal. 437, 12 Am. St. Rep. 69, 21 Pac. 114, where the rule relied upon by appellants that the servant cannot recover if his knowledge is as good as that of his master, was held to be erroneous. In that case it was said: "The master has no right to assume the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire, and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them." Mr. Justice Temple in the *Silveira* case said: "The employé is not required to use any degree of care or diligence to discover defects. He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect."

It is strongly urged that because plaintiff helped to construct this wall two years before he must be held to have known all ¹³⁰ about it. But he testified that he did not know where the eight-inch wall joined the thirteen-inch wall, and this is the vital fact in the case. We must assume that defendants knew this fact, and, if they did not know it, the duty was cast upon them to know it, and plaintiff had a right to assume that they did know it. The evidence is that this fact could not be discovered from any point where the men were working, and that to have ascertained the place of junction of the main wall and the fire or gable wall would have required the laborers to make an investigation apart from their duties, and which it was defendants' duty to make, and which plaintiff had a right to assume that defendants, as contractors, had made. When plaintiff remarked to Kreuzberger, "Aren't we getting pretty high?" he, no doubt, had in his mind that they were near the eight-inch wall, and perhaps too near to make it entirely safe to cut the groove where Kreuzberger indicated. But when he was assured by his employer that it was all right to go ahead where he pointed out, I think plaintiff was exonerated from making any independent investigation, and was justified in assuming that there was no danger and that his employer knew more about

the condition of the wall than he did. The danger was not obvious; it depended upon a fact which plaintiff did not know and which it was his employer's duty to know, and we think plaintiff was justified in going forward in obedience to the directions given him: See 1 Bailey on Personal Injuries, sec. 898 et seq., where the question is discussed and the cases pro and con are collected.

We do not think the findings are amenable to the objection that they are contradictory and argumentative. The alleged argumentative feature is in respect of allegations found in the answer which the finding negatives. One finding states that plaintiff was ignorant of the unsafe condition of the wall; and another finding states that he did not have a better opportunity than defendants for seeing and knowing its condition. Defendants' point is that because the finding was that plaintiff had no better opportunity, it in effect found that he had "as good an opportunity as defendants of seeing and knowing" the danger. We fail to see any necessary contradiction in the findings.

It is advised that the order be affirmed.

131 Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Temple, J., Henshaw, J.

MASTER AND SERVANT.—A SERVANT ASSUMES SUCH RISKS only as are ordinary, obvious, or known and incidental to his employment: *Illinois Steel Co. v. Bauman*, 178 Ill. 351, 69 Am. St. Rep. 316, 53 N. E. 107; he takes the risk of known dangers, and not of others: *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631. Master and servant do not stand upon equal footing, even when they have equal knowledge of danger: *Shortel v. St. Joseph*, 104 Mo. 114, 24 Am. St. Rep. 317, 16 S. W. 397; and the servant has a right to rely upon his employer's care, knowledge, and judgment, and rightfully may assume that he has taken all reasonable precautions to guard him from danger, and will not expose him to unnecessary risk: *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 South. 363. A servant has a right to rely upon his master's inquiry, because it is the master's duty to inquire: *Magee v. North Pacific etc. R. R. Co.*, 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114.

TOLAND v. EARL.

[129 Cal. 148, 61 Pac. 914.]

WILLS—JURISDICTION TO DETERMINE QUESTIONS ARISING UNDER—WHEN RESTRICTED TO THE PROBATE COURT.—Where none of the questions arising under a will respecting which the administrator entertains doubt relate to the administration of the estate, but solely to what distribution should be made of it after administration, a court of equity has no jurisdiction to consider and determine such questions, but they must all be disposed of by the decree of distribution to be entered by the court having jurisdiction of the estate.

EQUITY WILL NOT ENTERTAIN JURISDICTION TO CONSTRUE A WILL except as an incident to its jurisdiction over trusts, and, therefore, never undertakes to interpret a will which only deals with, and disposes of, purely legal estates and interests, and makes no attempt to create any trust relation with respect to the property devised or bequeathed.

EQUITY—JURISDICTION OF, TO CONSTRUE WILLS.—Where the law has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate, through which every purpose for which resort was formerly had to courts of equity is attained, and the deraignment of title to the property of deceased persons is through a decree of distribution entered as the final act in such administration, and jurisdiction over such proceeding is vested in the same court having jurisdiction of cases in equity, no independent suit can be brought for the interpretation of the will.

John B. Mhoon and Edward C. Harrison, for the appellants.

W. B. Treadwell, E. F. Treadwell, W. A. Beatty, and Shortridge, Beatty & Brittain, for the respondents.

149 TEMPLE, J. This action was brought by the administrator with the will annexed of the estate of Mary B. Toland, deceased, for the purpose of having the probate court instructed as to what distribution shall be made of the estate under the will. **150** There is a general averment in the complaint that differences exist between plaintiff and the defendants and among the defendants themselves, by reason of which plaintiff is unable to properly administer said estate, and some of the doubts relate to controversies not within the jurisdiction of the court sitting as a court of probate. But nowhere in the complaint is it shown that the administrator has any doubt as to anything he is required to do, and when the doubts stated are fully considered it is manifest that there is no embarrassment whatever as to the proper mode of performing his trust in the administration of the estate. The parties simply differ as to what distribution shall be made of the residue of the estate after

the administration has been completed. Plaintiff sues in his representative and also in his individual capacity. In his representative capacity he has no interest in the questions he seeks to raise. It is alleged that E. B. Mastick and George H. Mastick contend that certain rents are by the terms of the will given to them. This certain other defendants deny, and claim that such rents under the will belong to a fund for the payment of legacies. These are matters to be determined in the decree of distribution, and the doubts do not embarrass to any extent the administration. Ample funds are provided for the payment of the legacies, whatever conclusion may be reached upon that subject. There are no doubts as to whether it is necessary to provide, by sale or otherwise, a larger fund to pay legacies if these rents are given to E. B. and George H. Mastick.

Plaintiff contends as an individual that he is entitled under the will to an undivided one-half of the proceeds of a sale ordered in the will, while certain defendants contend that plaintiff is entitled only to one-half of what will remain in such fund after the debts, the expenses of administration, and legacies have been paid out of it. To determine these questions is a function of the decree of distribution, and it is not at all important that they should be sooner determined.

The jurisdiction of a court of equity cannot be brought into action on the ground that a trustee is seeking instruction as to the proper mode of executing his trust (conceding that under our system such could ever be a ground of jurisdiction, which I do not), for the will creates no trust estate and the questions¹⁵¹ are purely legal. Pomeroy says that the present doctrine, where courts entertain suits to construe wills, is that the jurisdiction is simply an incident of the general jurisdiction of courts of equity over trusts; and "that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates and interests, and which makes no attempt to create any trust relations with respect to the property donated": 3 Pomeroy's Equity Jurisprudence, sec. 1156.

This proceeding would not be tolerated even in those jurisdictions where it is still held that courts of equity may, under some circumstances, interfere to interpret trusts created by wills during administration.

But I think such a suit cannot be maintained under our system in any case. Nor do I think the question is as to whether the jurisdiction of courts of equity in this state is as extensive as was formerly the jurisdiction of the courts of equity in England. There is no controversy here as to jurisdiction between courts of law and courts of equity. Both jurisdictions are vested in the same courts, and such matters are only material in determining the character of the remedy to which the party may be entitled in a particular case.

The legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a minute code has been provided, through which every purpose for which resort was formerly had to courts of equity is attained. In England, only personalty was involved in the administration, but the relation of the personal representative to the creditors, legatees, and distributees was such, and the relief afforded in ecclesiastical courts so inadequate, that this was the most important branch of chancery jurisdiction: 1 Pomeroy's Equity Jurisprudence, sec. 77.

In the probate proceeding provision is made for the presentation and allowance of the claims of creditors, and, when the assets of the estate have been fully ascertained, upon notice the claims of creditors are ordered paid, if the assets are insufficient ¹⁵² to pay all, in a certain order. Certainly, this provision must be exclusive of the jurisdiction of a court of equity to marshal the assets and to direct the payment of claims.

If a legacy falls due, or a partial distribution of an intestate estate should be made, the probate court can order the personal representative to make the payment or distribution. This will also be done upon notice, and, the proceeding being in rem, when such notice is given the whole world is brought in. Surely, this must be exclusive of a suit in equity in which the parties are necessarily limited.

The same is true as to the settlement of the accounts of the administrator or executor. Elaborate provision is made to force the executor or administrator to account, and in this accounting the creditors and distributees are interested. In an insolvent estate it is a necessary preliminary to the marshaling of the assets for payment of creditors, and it is always a necessary preliminary to a final distribution. This settlement made after the prescribed notice is conclusive upon all interested parties.

But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes not only the law of the personalty, but also of the real estate. In other jurisdictions this decree is also held to be conclusive. But generally it concerns only personal property, and the power to make it does not involve the power to construe trusts in land created by the will. Here the probate court not only may, but should, and often must, construe the trusts created by the will. After the decree is made the will practically drops out of existence. The law of the estate is the decree and not the will, and, as I have said, all deraignments of title are through it: *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681.

The proceeding differs much from the systems of administration where the personal property goes to the personal representative ¹⁵³ and the land to the heir. Here the relation of the probate court to the executor or administrator is much more analogous to the relation of a court to its receiver. And here, too, the entire probate proceeding from the grant of administration, or the probate of a will, is calculated to give notice to the heirs of a decedent, and special notice is required to be given at the time when distribution will be made, where all interested parties can be heard. The distribution is declared to be conclusive upon the whole world.

It is no small consideration, in my opinion, that this probate proceeding is in the same court in which a suit would be brought to construe the will. The special proceeding may as well be in the nature of a proceeding in equity as at law, and it is before the same chancellor to whom it would be necessary to appeal in a personal action to instruct the administrator or executor and the court as to the proper construction of the will. If it were found necessary or convenient to embody such construction in an order so that appeal could be taken to the supreme court, this could easily be provided for in the proceeding. Why should Judge Coffey, sitting in probate, be instructed by Judge Coffey, sitting in a case in equity brought for that purpose?

If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, and the proceeding is in fact

for that purpose. It is the same court when sitting in matters of probate, and may exercise all equity powers necessary for a complete administration: *Estate of Burton*, 93 Cal. 459, 29 Pac. 36.

The cases relied upon to sustain this action, with the exception of *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394, all arose under the former constitution. In the mentioned case *Rosenberg v. Frank*, 58 Cal. 387, was followed without noticing that it arose under a different judicial system.

The probate proceeding then was not in the court presided over by the same chancellor before whom the action to obtain a construction of the trusts would be brought. The supreme court had held that the probate court was an inferior court. While I do not wish to conceal my opinion that a wrong view was taken in those cases, the intention that the jurisdiction of the court sitting in probate should be exclusive was not so obvious ¹⁵⁴ under that judicial system, and it was quite natural that lawyers trained under a different procedure should for a time fail to appreciate the change, and the early cases show this.

Wilson v. Roach, 4 Cal. 362, was an action against a guardian to compel him to account. The court said that district courts were vested with the jurisdiction by the constitution, and the legislature could not deprive them of the jurisdiction. The reasoning has no application now. The legislature has not attempted to deprive any court of its jurisdiction. It has only provided a mode in which that jurisdiction shall be exercised.

Clarke v. Perry, 5 Cal. 59, 63 Am. Dec. 82, was an action against an administrator to compel an accounting. He had accounted to the probate court, but it was contended that he had not fully accounted. The court held that one who was not an actual party to the accounting had in the probate court was not bound by it, and could proceed to enforce a full accounting in the district court. This was upon the ground that the probate court was of inferior and limited jurisdiction.

Deck v. Gerke, 12 Cal. 433, 73 Am. Dec. 555, was a case to compel an accounting and a distribution. Judge Baldwin commenced his opinion with a statement that, apart from previous decisions, it would be doubtful if the probate court had not exclusive jurisdiction, but he says the probate courts are courts of special and limited jurisdiction, and under the decisions courts of chancery have assumed jurisdiction; the principle asserted is more convenient in practice, and it is too late to question the jurisdiction.

Payne v. Payne, 18 Cal. 292, was a controversy submitted without action as the statutes permitted, and no question of the right in that mode to interfere with probate proceedings was raised or discussed.

In Rosenberg v. Frank, 58 Cal. 387, the point was the first time fully considered. That was also a consent case, and the remarks made upon the subject were evidently in reply to objections raised by a member of the court and set forth in a dissenting opinion. One argument urged in the dissenting opinion was that courts of chancery formerly took jurisdiction of cases of administration because the probate jurisdiction then existing ¹⁵⁵ was a "lame jurisdiction," and that under our system it was not so. The reply is, in effect, that all existing equity jurisdiction was by the constitution vested in the district courts, and the fact that other courts were vested with some equity jurisdiction did not limit the jurisdiction of the district court in the absence of prohibitory language in the constitution, or unless it appeared affirmatively that the jurisdiction conferred upon the other court was intended to be exclusive. It was also held that while the legislature could give to the probate court such probate jurisdiction as it saw fit, it could not take away from the district courts "any of the equity jurisdiction conferred on them by the constitution"; and it was also said that "the probate court held its jurisdiction subject to the exercise of this jurisdiction by the district court."

Rosenberg v. Frank, 58 Cal. 387, arose under the former constitution, and much of this reasoning has no force whatever as applied to our present judicial system. There is no possible question now as to what courts have probate jurisdiction, nor whether courts of equity do or do not have jurisdiction over matters of administration. The superior court has full chancery jurisdiction, and also probate jurisdiction, and a special proceeding in rem has been prescribed to it in which it is required to administer estates, whether testate or intestate. And, I repeat, there is no occasion in this case to determine whether while sitting in probate it is acting as a court of equity or not. It is clearly within its admitted jurisdiction, and further we need not go. We need not inquire under what branch of jurisdiction the particular proceeding comes, much less reasonable would it be to say that because formerly courts of chancery took cognizance of matters of administration on the ground that the jurisdiction of the ecclesiastical courts was a "lame jurisdiction," one judge of this court, calling himself a chancellor sit-

ting in a case in equity, can interfere to control another judge in the same court sitting in probate.

The proceeding is entirely statutory, and it is true that in some sense the court in this special proceeding is exercising a special and limited jurisdiction. The mode and procedure limit its jurisdiction. It is not there authorized to decide controversies not strictly within the probate proceedings. Except in ¹⁵⁶ the case of creditors it has no jurisdiction to determine claims adverse to the estate itself. Such was *Griggs v. Clark*, 23 Cal. 427. The remark made by Judge Crocker, and quoted as authority here, might as well have been made in an action of ejectment. It was not denied that such an action could be brought in a court of equity, nor was it claimed that the probate court had any jurisdiction over the matter. Executors and administrators have frequent occasion to sue and are often sued in other courts. But I do not see what that has to do with the matter under discussion here. To determine such controversies is not within the scope of the proceeding in probate; nor, except as to creditors, does the court in that proceeding acquire jurisdiction over controversies or persons not claiming under the decedent. And it may be said that creditors do so. They are given by statute a right as to the estate and to share in some sense in its distribution.

This matter was really determined in *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. 681. It was there said: "It would be an anomaly in jurisprudence that a court which is vested with full jurisdiction in matters of probate should be controlled in the exercise of that jurisdiction by the action of a co-ordinate court which has neither controlling nor revisory jurisdiction in such matters. The court was not required to follow that judgment, but could distribute the estate in accordance with its own views." That being so, a judgment in this case one way or the other could not affect the proceeding in the probate court, and would afford no protection to the administrator, if he were required to base any action upon it. It would, in fact, be a void judgment.

The judgment is reversed and the cause remanded, and the superior court is directed to dismiss the action.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

EQUITY AND PROBATE JURISDICTION.—Though the settlement of estates of decedents is committed to probate courts by statute, equity has jurisdiction whenever its aid is required and the powers of the probate court are insufficient to deal with the question at issue: *Bailey v. Bailey*, 67 Vt. 494, 48 Am. St. Rep. 826, 32 Atl. 470. See, too, *Peterson v. Vanderburgh*, 77 Minn. 218, 77 Am. St. Rep. 671, 79 N. W. 828. But its jurisdiction exists only in matters which lie outside the regular course of administration and settlement, which are purely of equitable cognizance, and which do not come within the scope of probate jurisdiction: See the note to *Deck v. Gerke*, 73 Am. Dec. 559.

CURTIS v. SCHELL.

[129 Cal. 208, 61 Pac. 951.]

ESTATES OF DECEDENTS.—One to whom the title or interest of an heir at law is transferred pending administration takes so much only of the share belonging to such heir as remains after the purposes and objects of the administration have been satisfied.

PRESUMPTION OF KNOWLEDGE OF LAW AND OF COURT PROCEEDINGS—LIMITATION UPON.—Though one is presumed to know the law, he is not presumed to anticipate any unusual or extraordinary proceeding taken under the form or guise of law. Hence, one loaning money to a widow to provide for her support and that of her minor children, and taking a mortgage on her interest in the estate, is not bound to take notice that an application will be made after all the children have reached their majority for a family allowance and for the sale of the property of the deceased to provide means for its payment.

INJUNCTIONS AGAINST JUDGMENTS AND OTHER JUDICIAL PROCEEDINGS.—Where by accident, mistake, fraud, or otherwise a party has an unfair advantage in a proceeding in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will restrain him from using the advantage which he has thus improperly gained.

ESTATES OF DECEDENTS—RELIEF IN EQUITY AGAINST A FAMILY ALLOWANCE.—If a widow, acting as executrix of the estate of her deceased husband, borrows money with which to support herself and her minor children, and secures its payment by a mortgage upon her interest in his estate, and, without disclosing to the court such mortgage, obtains an *ex parte* order for a family allowance, and subsequently an order authorizing her to sell the real property of the decedent to obtain funds with which to pay such allowance, whereby her title may be divested and such mortgage rendered unavailing, a court of equity has jurisdiction, after the time for appealing from such order has passed, to compel her to apply the proceeds of the sale of such property, as far as may be necessary, to the satisfaction of such mortgage.

Fisher Ames, for the appellants.

Gordon & Young, for the respondent.

211 VAN DYKE, J. This is a proceeding in equity to set aside an order granting a family allowance in the matter of the estate of Theodore L. Schell, deceased, and an order authorizing the sale of the real property of said estate for the purpose of paying said family allowance, and for general relief.

From the facts found the court, as a conclusion of law, held that the mortgages given to secure the indebtedness held by the plaintiff were a lien upon the interest of the defendant Georgiana L. Schell in and to the real estate of the estate of said Theodore L. Schell, and that said interest of defendant Georgiana L. Schell as an heir at law, legatee, and devisee of said Theodore L. Schell in the proceeds of the sale of said real estate should be applied to the payment and satisfaction of said borrowed money so secured by said mortgages, before the payment of said family allowance, and a decree was entered accordingly. This appeal is taken from the judgment and decree so entered, and from an order made and entered denying the motion of the defendants to set aside and vacate said judgment, and is based upon questions of law alone.

It is contended on the part of the appellants that the conclusions of law are not justified by the facts found; that there is no finding of fraud in procuring the order for a family allowance, or the order of sale to pay the same; that, failing to find fraud or to set aside the orders of the probate court, the jurisdiction of a court of equity was at an end, and the court, therefore, could not control or direct the application of the proceeds of the sale. A history of the case may be necessary to a proper understanding of the questions involved.

Theodore L. Schell died at the city and county of San Francisco, December, 1877, leaving a will by which the defendant Georgiana L. Schell and one William Hale were appointed executors. In June, 1886, Hale resigned as executor, and since that date the defendant, Georgiana L. Schell, has continued to administer the estate solely as the executrix of the said last will. By the terms of the will one-third of the estate was devised to said defendant Georgiana L. Schell, the widow of the said decedent, and the remaining two-thirds to his six children—the youngest of whom, a son, was, at the time of his death, two years old. It was provided in the will that the estate **212** should remain intact and undistributed until the youngest son should attain the age of twenty-one; and in the meantime the income of the real estate should be paid to said widow for the support and maintenance of herself and children. The

youngest son became of age December, 1896. The income from the estate, after the expenses of managing the same, not being sufficient to support the family, the widow from time to time borrowed money for such purpose, mingling the said moneys so borrowed with the moneys received by her as income from the said estate, and using the same for the family support. To secure the money so borrowed she executed mortgages to the parties loaning the same of all her right, title, interest, and estate as an heir at law, devisee, and legatee in and to the real estate of said estate. The first of the mortgages so executed was to the Bank of Sonoma County in April, 1883, and was given to secure the sum of five thousand six hundred dollars, with interest. The second was executed November, 1887, to Lewis F. Curtis, to secure the payment of the sum of three thousand dollars, with interest. These two mortgages covered lands belonging to said estate in Sonoma county. In November, 1887, she executed two other mortgages to said Lewis F. Curtis, one to secure the sum of two thousand eight hundred dollars, and the other the sum of twelve hundred dollars, with interest on each at the rate of eight per cent per annum, on certain real estate belonging to said estate in the city and county of San Francisco. The mortgage held by the Bank of Sonoma County was foreclosed, and the interest covered by the same sold thereunder, which interest has become vested in the plaintiff. The other mortgages by proper assignment and transfer have also become vested in the plaintiff. Two of the children having died, their interest under the will became vested in their mother, the defendant, Georgiana L. Schell. On December 14, 1896, on the petition of the said Georgiana L. Schell, the probate court of the city and county of San Francisco, in which the estate was being administered, granted an order for family allowance in the sum of one hundred and fifty dollars a month, running back to the 1st of January, 1880, aggregating, as stated in the findings, the sum of about thirty thousand dollars. Thereafter on the 23d of April, 1897, said ²¹³ probate court made and entered an order to sell the real estate of said decedent to pay said family allowance and expenses of administration; and it is found that said order was based upon the claim made by said executrix that there was then due the sum of thirty-six thousand dollars for expenses of administration and for said family allowance, and there was no personal property remaining in the hands of the said executrix wherewith to pay the same. The value of the whole of the property

of the said estate in December of that year was appraised at forty-four thousand three hundred and ninety-six dollars.

As above shown, the decedent directed by his will that all the income of the estate should belong to the widow for the purpose, among other things, of providing family support; but said income, it appears, did not afford sufficient means for the support of the family, and hence the widow, instead of obtaining an order of court for the sale of the property of the estate to provide for family support, borrowed money from time to time, and used such money, as found by the court, for the purpose of supporting the family. This state of things continued about nineteen years, and until after the youngest of the children had attained majority. The mortgages to secure the money borrowed, as already appears, were executed by Georgiana L. Schell on her interest as devisee, legatee, and heir at law of Theodore L. Schell, deceased.

The rule of law is as claimed by the appellant, that one to whom the title or interest of an heir at law is transferred pending administration takes only so much of the distributive share belonging to said heir as remains after the purposes and objects of administration have been satisfied. It is therefore claimed that the mortgagee who loaned money in this case did so presumably knowing the law. Although a party is presumed to know the law, he is not presumed to anticipate any unusual or extraordinary proceeding taken under the form or guise of law. Family allowance in the administration of an estate is generally for a temporary purpose, and the settlement of an estate and the distribution of the same to the parties entitled thereto generally takes place within a reasonable period. Certainly, no one would be bound to take notice that an application for a family allowance would be made, as in this case, after all the ²¹⁴ children had ceased to be a charge upon the widow, and after the estate was ready for distribution under the terms of the will, and in view of the fact that the money loaned was for the purpose of supporting the family, and presumably in view of avoiding the necessity of selling the estate to provide a family allowance. The application for family allowance was, therefore, not in the ordinary course of procedure. Upon the hearing of the petition for family allowance, although it was stated that the petitioner had borrowed money from divers persons for the support and maintenance of herself and family, it was not stated that these sums had not been paid, and it is found "the court was not informed, and at the time of making

said order for said family allowance had no notice or knowledge that the said defendant, Georgiana L. Schell, had made and executed the mortgages mentioned." This was the suppression of a very material fact, which ought to have been brought to the knowledge of the court. The amount of debts, exclusive of these mortgages, and including the family allowance, as shown by the finding, was some thirty-six thousand dollars, and the value of the whole property, as also found, was forty-four thousand three hundred and ninety-six dollars. Deducting the expenses, including the family allowance, from the whole value of the property, would leave only a little over eight thousand dollars. The widow held a five-ninths interest in this, which would be less than five thousand dollars. The amount secured by mortgages which were a subsisting lien upon the interest of the petitioner with accumulated interest aggregated from twenty thousand to twenty-five thousand dollars. Therefore, if the scheme inaugurated on behalf of the petitioner should be carried out by a sale of the entire property for the payment of the said family allowance and the expenses of administration, there would be less than five thousand dollars remaining of the interest belonging to her with which to discharge the indebtedness due the plaintiff, leaving nearly twenty thousand dollars unpaid. The case here is different from that of simply buying the interest of an heir, in which, of course, the purchaser takes what is left upon distribution, after the settlement of the estate, including the charges and expenses of administration. Here, as already appears, the money was advanced ²¹⁵ for the purpose of supporting the family. It was in lieu of a family allowance, and it was loaned not to an heir merely, but to the sole executrix of the estate, who is a trustee to protect the interests of creditors: *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760.

To give the appellant, under the name of family allowance, the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law, designed for a beneficent purpose, into an instrument for the perpetration of a gross fraud. It is not to be supposed that a court possessed of all the facts and circumstances of the case would permit itself to be used for such purpose. "In general, it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against

conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained": Story's Equity Jurisprudence, sec. 885. In *Insurance Co. v. Hodgson*, 7 Cranch, 332, Chief Justice Marshall laid down the rule in such cases as follows: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly appears to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chancery." In this case the respondent was entirely helpless as against the proceedings in the probate court initiated and carried on by the appellant. The proceeding to set aside family allowance is *ex parte*. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question examined on the application for ²¹⁶ the family allowance. The case, therefore, does not fall within the restrictions against setting aside judgments of courts obtained through intrinsic fraud, such as *United States v. Throckmorton*, 98 U. S. 61, and other cases in that line relied upon by appellants. The respondent had no adequate relief, either by appealing from the order entered in the probate court or upon motion to set it aside. The probate court does not possess the requisite machinery to try a question of fraud; that is the peculiar province of a court of equity: *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *Wickersham v. Comerford*, 96 Cal. 433, 440, 31 Pac. 358; *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760.

Wickersham v. Comerford, 96 Cal. 433, 440, 31 Pac. 358, was an action to set aside an order of the probate court designating and setting apart a homestead to the defendant, the widow of Richard Comerford. Said Comerford, some time prior to his death, had entered into an agreement of separation with his wife, Sarah, under which agreement the property of said parties was divided, and she relinquished all right as wife in law or

equity for support and maintenance. Upon the execution of this agreement the parties immediately separated and never again lived together. The wife with her minor son removed to Alameda county upon the property which was conveyed to her under the deed of separation, and the husband remained at their former place of residence in Sonoma county. After his death the wife took out letters of administration upon his estate, and thereafter made an application to have certain property in Sonoma county, which had been purchased by the husband with the proceeds of his separate estate, set apart to her as a homestead, which application was granted by the probate court of said county. On the application for setting apart the homestead nothing was stated in reference to the deed of separation or the division of the property thereunder. The complaint in the case charged a willful suppression of material facts, and the suggestion of a falsehood by the defendant with the intent to deceive and mislead the court to the prejudice of the creditors of the estate, and averred that such suppression and suggestion had the intended effect to the injury of the plaintiff, who was one of such creditors. This court held that that constituted fraud, and answers the contention on the part of the defendant there 217 that the only remedy was an appeal from the order setting apart the homestead as follows: "No doubt that order was appealable, but conceding that plaintiff's relation to the case (that of a mere creditor of the estate whose claim had not been allowed) was such as would have entitled him to appeal from that order, yet he could have obtained no adequate relief by such appeal; since neither the fraud upon which this action is grounded, nor the fact that plaintiff was a creditor, could have been brought into the record on appeal from that order. Nor did plaintiff have an adequate remedy by motion to vacate the order, even conceding that he was entitled to make such motion, and had made it within the proper time. To say nothing of the disadvantage of trying an issue of fraud on such a motion, he could not have appealed from an order denying the motion, because the order sought to be vacated, viz., the order setting apart the homestead, was itself an appealable order: Citing a number of cases. It will hardly be contended that a remedy for the wrongs complained of, thus restricted, is not defective and inadequate, as compared with an original equitable action adapted to a thorough investigation of the issues, and in which all errors committed by the trial court may be corrected on appeal."

Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. Rep. 619, was an original suit in the circuit court of the United States for the district of Louisiana, brought for the purpose of setting aside fraudulent and void sales made by a testamentary executor under the orders of the probate court in said state. In that case it was contended that the plaintiff was concluded by the proceedings in the probate court, which was alleged to have exclusive jurisdiction of the subject matter, and that its decision was conclusive against the world, especially against the plaintiff, who was a party to the proceeding. The supreme court of the United States in its opinion, conceding that the administration of the estate there in question properly belonged to the probate court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: "But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact ²¹⁸ of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed in pais or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it and of any inequitable advantage which they have derived under it": Citing a large number of cases.

Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. Rep. 237, presented the question as to the jurisdiction of a probate court to make a sale of the lands there in controversy, and confirm sales reported by the guardian in said proceeding in probate. It was claimed there, as here, that the party complaining was bound by the judgment and orders of the probate court. The supreme court of the United States, however, says in its opinion: "But it is insisted that the circuit court of the United States sitting in Ohio is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the probate court of Defiance county. If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate

its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmering, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction on the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the circuit court is not bound to give relief according to the recognized rules of equity as administered in the courts of the United States."

219 To the same effect is *Bowen v. Evans*, 2 H. L. Cas. 257: "If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud."

It appears, therefore, from the foregoing cases—and many others to the same effect might be cited—that it was not necessary to first revise or set aside the orders made by the probate court. The desired purpose can be accomplished by allowing the sale ordered by that court to proceed, but to direct and control the disposition of the proceeds of such sale according to the right of the case, and this was done by the court below in its decree.

The order herein for the family allowance, and also for the sale of the real estate, were made by the superior court in the exercise of its probate jurisdiction. No appeal was taken from either of these orders, nor was any motion to modify or set them aside made in the proceeding before the probate department until after the time limited for an appeal therefrom, and the orders had thus become final, and no relief from them could be had in the probate department even if under any circumstances that department could have given relief. When it appeared that the order for family allowance had been made to reimburse the widow for moneys which she had already expended in the support of her family, and that she had obtained these moneys from the assignors of the plaintiff herein by mortgaging her interest in the estate as security for their repay-

ment, and, without disclosing this fact, had as executrix obtained an order for the sale of the entire estate under which the purchaser would take the title discharged of such mortgages, there was presented the precise case in which a court of equity should interfere to control the enforcement of the judgment of another court by directing the application of the proceeds of that sale.

²²⁰ In its judgment herein the superior court does not purport to set aside or modify either of these orders, but controls Mrs. Schell in the disposition of the moneys which may be received by her upon the family allowance. Neither does the court assume to determine the amount of the charges and expenses of administration which are to be paid out of the proceeds of the sale. These matters, as well as the return of sale that may be made under the order of sale, and the hearing upon the application for its confirmation, are within the jurisdiction of the probate department, and will be determined by it. The superior court by its judgment herein in no respect interferes with the jurisdiction of the probate department in reference thereto. It takes control of the disposition of the proceeds of the sale after the confirmation and payment of those charges and expenses, and at that point intercepts the appropriation by Mrs. Schell to herself of the proceeds of the sale of her interest in the real estate which she had mortgaged to the assignors of the plaintiff by compelling the executrix to apply these proceeds, as far as may be necessary or applicable, in satisfaction of the liens which Mrs. Schell, as widow and heir of the deceased, had created upon that interest for the express purpose of obtaining the money for the reimbursement of which the order of sale was made. The judgment merely compels the executrix to make the payment of the family allowance to the assignee of the widow in accordance with contracts theretofore made by her.

The equitable relief thus sought could not be granted in the probate department of the court, for the reason that such relief is not within its probate jurisdiction. Sitting as a court of probate, the superior court exercises a special and limited jurisdiction under statutory procedure, and, although guided by principles of equity in the exercise of that jurisdiction, does not exercise its general jurisdiction in equity, but is limited to matters in probate, and, in the administration of the estates of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and

claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally, the expenses incurred in the administration, and a temporary provision ²²¹ for the support of the family, including a homestead where proper, are to be taken from the estate. This provision, however, is in reality a distribution of a portion of the estate to those who by virtue of the statute are entitled thereto. Under its probate jurisdiction the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered. For this want of jurisdiction in the proceeding for the administration of the estate, the equity jurisdiction of the court was properly invoked and exercised herein.

The judgment and the order denying the motion to vacate and set aside the said judgment are affirmed.

Temple, J., Harrison, J., McFarland, J., and Henshaw, J., concurred.

BEATTY, C. J., concurring. I concur in the judgment and generally in the opinion of Justice Van Dyke. I am not, however, prepared to say that the probate court, as such, is without jurisdiction, in making an order of family allowance for the purpose of reimbursing moneys advanced for family support, to extend the benefit of its order to a third party who, at the request of the executor or administrator, has made such advances. I think, on the contrary, that if in this instance the facts had been disclosed to the probate court at the time the order of sale was made, it would have been perfectly competent for that court to have directed payment to the plaintiff here of all sums advanced by her for the support of the family. This view does not in my opinion invalidate the conclusion that she can sustain the present action to enforce her equitable claim upon the fund which will result from the sale of the property. She had no actual notice of the proceeding in the probate court, and her failure to make her claim there was not her fault, but the fault of the defendant.

THE PRESUMPTION OF KNOWLEDGE OF LEGAL RIGHTS and the relief obtainable from mistakes of law are considered in the monographic note to Alabama etc. Ry. Co. v. Jones, 55 Am. St. Rep. 496-520.

JUDGMENT.—EQUITABLE RELIEF may be granted if, by accident, mistake, fraud, or otherwise, a party has obtained an unfair advantage in proceedings in a court of law, which necessarily must make that court an instrument of injustice unless the advantage thus gained is restrained: *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143, 28 Pac. 563.

BERONIO v. VENTURA COUNTY LUMBER COMPANY.

[129 Cal. 232, 61 Pac. 958.]

PRACTICE—SINGLE CAUSE OF ACTION.—If a complaint seeks to have a sheriff's deed adjudged void and the plaintiff's title quieted against any claim of the defendant, it presents but one cause of action, namely, the enforcement of the plaintiff's right to the premises against the unlawful claim of the defendant thereto. A plaintiff may often be entitled to several species of remedy for the enforcement of a single right.

HOMESTEAD — PREMISES USED AS A STORE AND HOTEL.—One who owns premises on which he maintains a two-story building for the purpose of conducting therein a general merchandise store and hotel, occupying a portion of the building with his family, is not entitled to dedicate the premises as a homestead, and his conveyance thereof after the attempted dedication, though his wife does not join therein, is valid.

JUDGMENT FORECLOSING A MORTGAGE—EFFECT OF UPON PARTIES HOLDING TITLE UNDER A CONVEYANCE ANTEDATING THE MORTGAGE.—Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in a suit for its foreclosure. If one holding a conveyance of prior date to that of a mortgage is made a party defendant under a general allegation that he has some interest in the premises subsequent and subordinate to that created by the mortgage, and judgment is taken against him by default or upon an answer denying such averment, and is followed by a sale thereunder of the premises, the title of such prior grantee is not affected by such judgment and sale.

Henning & Bowen, for the appellants.

Blackstock & Ewing, for the respondent.

234 HARRISON, J. Suit to quiet title. The complaint sets forth that in the year 1884 Gaetano Beronio, Sr., was the owner of the land involved in the action, and built thereon a two-story brick building for the purpose of conducting therein a general merchandise store and hotel. He was at that time unmarried, and with his servants conducted said business and hotel until December 29, 1886, when he married, and thereafter with his wife continued to conduct said business, occupying a portion of the building with his family for that purpose. There were several other buildings upon the lot, separated from

the hotel building, all of which were used in connection with the hotel business, but not as the dwelling of Beronio or of his family. February 3, 1887, he executed and acknowledged a ²³⁵ declaration of homestead upon said lot, sufficient in form, and filed the same with the county recorder. January 10, 1891, he executed a deed of conveyance of said lot to Charles Ingalls, which was recorded in the office of the county recorder on the same day. This conveyance was intended for the benefit of the plaintiffs herein, and on June 4, 1892, Ingalls conveyed the lot to them by deed, which was recorded on the same day. April 13, 1892, Beronio, Sr., and his wife executed a mortgage of the lot to Roger McMenamin, and on December 13, 1896, Catherine Walsh, to whom this mortgage had been assigned, commenced an action for its foreclosure, in which these plaintiffs were named as defendants. In the complaint therein it was alleged that these plaintiffs claimed an interest in said mortgaged premises, and that their claim was subsequent and subordinate to said mortgage, and the court found and decreed in that action in accordance with this allegation. Under the judgment rendered therein the property was sold by the sheriff October 16, 1897, to Catherine Walsh for the amount of the judgment and costs, and immediately thereafter she assigned the sheriff's certificate to the defendant herein, to whom on April 17, 1898, the sheriff executed a deed of conveyance. Upon these facts the plaintiffs ask that the sheriff's deed be adjudged void, and that their title to the premises be quieted against any claim of the defendant. The defendant demurred to the complaint upon the ground that it failed to state a cause of action, and also upon the ground that two causes of action had been improperly united therein, viz., an action to quiet the plaintiff's title, and an action to have the sheriff's deed declared void. The demurrer was sustained by the court, and from the judgment entered in favor of the defendant the plaintiffs have appealed.

1. The complaint presents only a single cause of action, viz., the enforcement of the plaintiff's right to the premises in question against the unlawful claim of the defendant thereto. As a portion of the remedy for the enforcement of that right it seeks the annulment of the sheriff's deed, but a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right: Pomeroy's Code Remedies, sec. ²³⁶ 459; *Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82; *McLennan v. McDonnell*, 78 Cal. 273, 20 Pac. 566.

2. Upon the authority of *McLaughlin v. Wright*, 63 Cal. 113, affirmed in *McDowell v. His Creditors*, 103 Cal. 264, 42 Am. St. Rep. 114, 35 Pac. 1031, the declaration filed by Beronio did not have the effect to impress the property with any of the characteristics of a homestead. The conveyance by Beronio, without his wife uniting therein, had the effect, therefore, to transfer to Ingalls the title to the property, and, being of record at the date of the execution of the mortgage, was notice to the mortgagee that Beronio had already parted with his title thereto. Under the conveyance by Ingalls to the plaintiffs they therefore took the property freed from the encumbrance of the mortgage, or of any title derived thereunder.

3. It is contended, however, on behalf of the defendant that, inasmuch as the plaintiffs herein were made parties defendant in the foreclosure suit, and the court decreed in that action that their rights and interests in the mortgaged premises were subsequent and subordinate to the mortgage, they are estopped from asserting any claim thereto adverse to the title derived by virtue of the sale under said judgment of foreclosure.

In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action: 1 *Greenleaf on Evidence*, sec. 528; *Kerr v. Hays*, 35 N. Y. 331; *Cromwell v. County of Sac*, 94 U. S. 351; *Russell v. Place*, 94 U. S. 606; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 30 Pac. 1108. "Every estoppel must be certain to every intent, and not to be taken by argument or inference": *Coke on Littleton*, 352b. "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence": *Russell v. Place*, 94 U. S. 606. By section 1908, subdivision 2, of the Code of Civil Procedure, the effect of a judgment is conclusive "in respect to the matter directly adjudged," ²³⁷ and, by section 1911, "that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessarily thereto."

The object of a suit for the foreclosure of a mortgage is to subject to a judicial sale and vest in the purchaser thereunder the same title or estate in the mortgaged property which the

mortgagor had at the time of the execution of the mortgage, and the only proper or necessary parties defendant to such suit are the mortgagor and those who claim an interest in the property derived subsequent to the date of the mortgage. Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in the suit: *Jones on Mortgages*, sec. 1589; *Wiltzie on Foreclosure*, secs. 191, 192; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347. Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit: *Ord v. Bartlett*, 83 Cal. 428, 23 Pac. 705; *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223; *Hoppe v. Hoppe*, 104 Cal. 94, 37 Pac. 894. If, however, the plaintiff makes the holder of an adverse title a party defendant to the foreclosure suit, setting forth facts from which he claims that such title is subordinate to his mortgage, and issues upon these facts are presented for adjudication without objection on the part of the defendant, the judgment of the court thereon will not be void. The court may decline to pass upon the question as not germane to the suit for foreclosure, or it may determine that such claim of the defendant is unfounded, or that his interest in the premises is subordinate to the mortgage, or it may render a decree of foreclosure subject to the prior rights of such defendant. The subject matter of such controversy will be within the jurisdiction of the court, and, if the parties thereto submit the controversy to its determination, the judgment thus rendered will be as conclusive upon them as if rendered in an action specially brought for that purpose, and will not be subject to collateral attack: *Helek v. Reinheimer*, 105 N. Y. 470, 12 N. E. 37; *Goebel v. Iffla*, 111 N. Y. 170, 18 N. E. 649; *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932.

Under the usual allegation in a complaint for foreclosure ²³⁸ that a defendant other than the mortgagor claims some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, any prior interest held by such defendant is not affected by the judgment therein. Such averment is not material to the plaintiff's cause of action, nor is it an issuable fact, and whether the court rendered judgment upon the default of the defendant, or upon an issue created by his denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment: *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Frost v. Koon*, 30 N. Y. 428; *Smith v. Roberts*,

91 N. Y. 470; *Payn v. Grant*, 23 Hun, 134; *Elder v. Spinks*, 53 Cal. 293; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220.

It does not appear that in the foreclosure suit there was any adjudication upon the title of the plaintiffs which is set forth in the complaint herein, or that their claim that their interest in the mortgaged premises is superior to that derived under the mortgage was submitted to that court for determination, or was determined by it. The allegation in the complaint therein that they claimed an interest in the mortgaged premises, and that this claim was subsequent and subordinate to said mortgage, did not present this issue for determination. The averment that their claim was "subordinate" to the mortgage was but a legal conclusion, and the allegation of fact upon which that conclusion depended—that the claim was subsequent to the mortgage—negated any claim that it was prior thereto. The answer of these plaintiffs was but a denial of these allegations, and their admission that they had an interest in said premises as purchasers was not only consistent with the allegations of the complaint and with the object of the foreclosure suit, but failed to present any issue upon a claim of title superior to that covered by the mortgage, or upon the validity of such title. No facts were alleged, either in the complaint or in their answer, by which an issue upon their title or claim was presented to the court or made a subject for its determination, and the oral statement of their attorneys to the court, and its finding and decree thereon that their claim and interest ²³⁹ were "subsequent" and subordinate to said mortgage, is of no higher force than if made upon their default.

The demurrer should, therefore, have been overruled.

The judgment is reversed, and the superior court is directed to enter an order overruling the demurrer of the defendant, and giving to it a reasonable time within which to answer the complaint.

Van Dyke, J., and Garoutte, J., concurred.

IN THE CASE of *Murray v. Etchepare*, 129 Cal. 318, 61 Pac. 930, it was held that a cross-complaint of a defendant in an action to foreclose a mortgage, who had at one time been the owner of the mortgaged premises, averring that the conveyance made to the mortgagor was procured by fraud and false representations on his part, and that this was known to the plaintiff when the mortgage was taken, undertook to assert a paramount and hostile title, and should not be permitted to be filed, and that the principle that an adverse title cannot be litigated in a foreclosure suit and is not affected by a decree of foreclosure applies as well to adverse equitable as to adverse legal estates.

HOMESTEAD, WHETHER MAY INCLUDE HOTEL.—A building constructed for use as a hotel, and used primarily for that purpose, cannot be selected and held exempt as a homestead, though the owner and his family occupy it as their home: *McDowell v. His Creditors*, 103 Cal. 264, 42 Am. St. Rep. 114, 35 Pac. 1031. But see *Cass County Bank v. Weber*, 83 Iowa, 63, 32 Am. St. Rep. 288, 48 N. W. 1067; *Turner v. Turner*, 107 Ala. 465, 54 Am. St. Rep. 110, 18 South. 210; monographic note to *Pryor v. Stone*, 70 Am. Dec. 349, 350.

MORTGAGE FORECLOSURE -- LITIGATION OF TITLE.—A suit to foreclose a mortgage is not a proper proceeding in which to litigate questions of adverse or paramount title: *Farmers' Nat. Bank v. Gates*, 33 Or. 388, 72 Am. St. Rep. 724, 54 Pac. 205. Compare *Provident Loan Trust Co. v. Marks*, 59 Kan. 230, 68 Am. St. Rep. 349, 52 Pac. 449. On the effect of a default judgment, in foreclosure proceedings, against the holder of an adverse or paramount title, see the monographic note to *Provident Loan Trust Co. v. Marks*, 68 Am. St. Rep. 360-362.

DANIELS v. JOHNSON.

[129 Cal. 415, 61 Pac. 1107.]

MORTGAGE—EFFECT OF CONVEYANCE ASSUMING PAYMENT.—If a deed specifies that it is subject to a mortgage (designating it), and that the grantee assumes its payment, this amounts to a covenant that he will pay the note for the security of which the mortgage was given.

MORTGAGE—STATUTE OF LIMITATIONS—WAIVER OF IN A COVENANT BY A GRANTEE.—If a conveyance of mortgaged premises refers to a mortgage and declares that the grantee assumes its payment, that declaration waives so much of the statute of limitations as had run in favor of the mortgagor, and establishes a continuing and not a new contract. The mortgage continues as security for the period during which the original note as thus continued had to run.

MORTGAGE—ASSUMPTION OF BY GRANTEE—RIGHT OF MORTGAGEE TO SUE THEREON.—If a conveyance of property asserts the existence of a mortgage thereon, which the grantee assumes, the mortgagee may foreclose the mortgage in the event of its nonpayment when due, and hold such grantee liable for any deficiency for which the original mortgagor was liable.

MORTGAGE—RENEWAL OR EXTENSION—WHAT IS NOT.—A statute providing that a mortgage can be renewed or extended only by a writing executed with the formalities required of grants of real property is not applicable to a continuation of an original liability for a longer term before the statute of limitations had barred the right of action thereon. In such case the mortgage remains as security for the payment of the debt during the term as so extended.

Otis & Gregg, for the appellants.

E. R. Annable and Charles E. Truesdell, for the respondent.

416 **CHIPMAN, C.** Foreclosure. On February 23, 1892, one Wilson made his promissory note to plaintiff, payable February 3, 1893, and to secure its payment he executed his mortgage, of even date with the note, to foreclose which this action was brought on June 9, 1897. Defendant Hammond made default, and plaintiff dismissed the action as to defendants Wilson, Howe, and Hogan. Plaintiff had judgment, and defendants Johnson and wife appeal from the judgment and the order denying their motion for a new trial. The only defense is the four year statute of limitations, section 337 of the Code of Civil Procedure. On its face the note was barred, but the complaint averred an express renewal of the note and mortgage and certain acknowledgments of the debt and new promises to pay.

It appeared from the evidence that Wilson, the mortgagor, conveyed the mortgaged premises by deed to defendant Howe on September 28, 1892, containing the following: "This deed is given subject, nevertheless, to one certain mortgage dated February 2, 1892, given by grantor herein to H. H. Daniels, for the sum of seven hundred and fifty dollars, and which said mortgage is of record in book 42 of mortgages, at page 351 thereof, said San Bernardino county records, and which said mortgage the grantee herein assumes and agrees to pay." On January 28, 1893, Howe conveyed the premises by deed to defendant Hogan, the deed containing a provision identical with that just quoted. On December 21, 1895, Hogan conveyed the premises **417** by deed to defendant Alfred Johnson, the deed containing the provision: "Subject, however, to a certain mortgage of seven hundred and fifty dollars dated February 2, 1892, upon which has been paid fifty dollars; the party of the second part hereby assumes the payment of the above mortgage." Appellant contends that the above provisions found in the deeds do not constitute a promise of defendant Johnson to pay the note, but that they amount to nothing more than an agreement on his part to discharge the mortgage lien. It is also contended that a mortgage cannot be renewed or extended except as provided by section 2922 of the Civil Code. The effect of the condition in the deed was more than an agreement to discharge the lien; it was, in our opinion, an agreement to pay the note secured by the mortgage, for in no other way could the mortgage be paid. It was said in *Stuyvesant v. Western Mortgage etc. Co.*, 22 Colo. 28, 43 Pac. 144: "While the language of an agreement is that the plaintiff shall pay the mortgage, the real meaning of the covenant is that plaintiff shall pay the note which the mortgage

secures, for the discharge of the note is the only way to pay the mortgage, the latter being only the incident, the note being the principal thing."

The effect of the deed from Wilson to Howe, executed as it was while the note was a subsisting obligation, or, in other words, before it was barred by the statute of limitations, was to waive so much of the period of limitations as had run in favor of Wilson, the mortgagor, and established a continuing contract and not a new contract. There was no merger of the old debt in the new, but merely a continuation of the original liability for a longer term. There was no renewal of the lien, and no occasion for its renewal; it was not extended, nor was it extinguished, but continued for the period during which the note, as continued, had to run (*Southern Pac. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818), and this result differs, as is pointed out in the case just cited, from the result which would follow where the original obligation is renewed after the bar of the statute has occurred, which was the case of *Wells v. Harter*, 56 Cal. 342. The same may be said of the effect of the deed from Howe to Hogan of January 28, 1893, which was within four years from the maturity of the note. ⁴¹⁸ And so, also, when Hogan conveyed to Johnson, December 21, 1895, more than four years had not elapsed from the maturity of the note.

As between the parties to the deed, *Southern Pac. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145, is authority for holding that the mortgage lien was not barred, and the only question is whether the agreement of Johnson is available to the mortgagee. It was said in *Tulare County Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092: "It may be that there is no such privity of contract between the mortgagee and the grantee of the mortgagor resulting from the acceptance of the deed, nor any such promise for the benefit of the mortgagee as would sustain an action at law against him; . . . yet, in equity, the creditor is entitled to the benefit of all securities or collateral obligations that his debtor may have acquired for the payment of the debt, and the creditor may, in his action to foreclose the mortgage, treat the mortgagor's grantee, who has assumed payment of the debt, as a principal debtor, and hold him liable for any deficiency for which the mortgagor would be liable on his express promise": Citing *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411. See, also, *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818.

"A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety; but the mortgagee may treat both as principal debtors, and may have a personal decree against both": Jones on Mortgages, sec. 741. We entertain no doubt of the right of the mortgagee to look to the grantee in a case such as the present one.

We do not question the proposition that when the debt is barred the remedy under our system is lost. It was so held at an early day by this court (Lord v. Morris, 18 Cal. 482), and many times since. But the very question here is, Was not the statute avoided as to the debt as well as to the mortgage by the agreement in the deed referred to? And this question, we think, must be answered in the affirmative.

It was alleged in the complaint, and found by the court to be true as to Hogan, that plaintiff did, at the special request of Howe and Hogan, by an instrument in writing subscribed by the plaintiff and by him delivered to Howe and Hogan, extend ⁴¹⁹ said note and mortgage for the period of one year from February 22, 1893, to wit, until February 2, 1894, and that defendant Johnson did, within four years before the commencement of the action, by an instrument in writing signed by him and delivered to plaintiff, promise to pay the said note and mortgage. Appellant objected to the evidence offered to prove a part of these allegations on the ground that it was secondary, the written evidence not having been sufficiently accounted for to entitle plaintiff to make the proof by parol. It is not necessary to examine these objections, nor whether the findings upon this branch of the case were justified by the evidence. The judgment finds support in the agreements found in the deeds, conceding that the findings as to the other agreements are unsupported. If it was error to admit the evidence in support of these findings, it was not prejudicial.

The judgment and order should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

MORTGAGE—ASSUMPTION BY GRANTEE.—If a grantee agrees to pay a mortgage on the premises conveyed as a part of the purchase price, he makes the mortgage his own as effectually as though he had executed it himself: Farmers' Nat. Bank v. Gates, 33 Or. 388, 72 Am. St. Rep. 724, 54 Pac. 205. The right of the mortgagee to take advantage of the grantee's assumption is commonly

enforced by making him a party to the bill to foreclose, and praying a personal decree for the deficiency against him: See the monographic note to *Klapworth v. Dressler*, 78 Am. Dec. 76; but he is not liable for such deficiency unless the grantor was liable for the payment of the mortgage: *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432.

MELONE v. RUFFINO.

[129 Cal. 514, 62 Pac. 93.]

EVIDENCE—PAYMENT—BURDEN OF PROVING.—If the plaintiff proves the existence of the debt sued upon, the burden of establishing its payment is on the defendant, although, in his complaint, it was necessary for the plaintiff to allege nonpayment.

STATUTE OF FRAUDS—ABBREVIATIONS.—A contract authorizing the sale of land is sufficient, though abbreviations are used therein, if they are such that anyone familiar with land descriptions and abbreviations used in describing land would have no difficulty in supplying the terms represented by the abbreviations. Especially is this true when there is a diagram attached to the contract, rendering the signification of the abbreviations more obvious.

CONTRACT—VARIANCE BETWEEN AND THE AUTHORITY GIVEN TO MAKE IT.—Variances between an authority given to sell real property and a contract of sale made by the agent thereunder are immaterial, if such contract was printed on the back of the authorization, and the two constitute but one instrument, and from both it is clear that all the parties had reference to the same property.

EVIDENCE, PAROL, TO SHOW THE CAPACITY IN WHICH A PARTY ACTED.—Where a written authorization to sell real property is signed by the principal, and his signature is followed by the words, "Administrator of the estate of A B, deceased," it is competent for him to prove by parol that he was acting as such administrator, and that all the parties so understood.

ADMINISTRATOR—WHEN PERSONALLY LIABLE ON A CONTRACT.—If an authorization to sell real property uses the first person, and the signature of the principal is followed by the words, "Administrator of the estate of A B, deceased," such administrator is personally liable upon a contract made pursuant to such authorization to refund moneys paid to the purchaser to whom no conveyance is made pursuant to the contract or otherwise.

ADMINISTRATOR—CONTRACT OF—WHEN NOT UNLAWFUL ON ITS FACE.—A contract by an administrator to sell lands of his intestate, though not authorized by any order of court, is not unlawful in the sense that it deprives the purchaser of the right to recover from the administrator a deposit paid thereon.

PRINCIPAL AND AGENT—CONTRACT—WHEN NOT THAT OF THE AGENT.—If a principal authorizes his agent to sell real property, and a contract is made in the principal's name pursuant to the authorization, he cannot escape liability for a de-

posit paid thereon on the ground that the contract was that of the agent and not of himself, because it was orally agreed between them that the agent was to have all the purchase money above a sum specified.

George C. Sargent, for the appellant.

O'Brien, O'Brien & O'Brien and Andrew G. Maguire, for the respondent.

516 THE COURT. Action on a contract, entered into by defendant's testator and plaintiff's assignor for the sale of land by the former to the latter, to recover the deposit made by plaintiff on account of the purchase. Plaintiff had judgment for the amount of deposit, to wit, nine hundred and twenty-two dollars and fifty cents, being ten per cent of the purchase price of the land, and also for interest thereon from June 10, 1893, amounting in all to twelve hundred and thirty-six dollars and eighty cents, and for costs. Defendant appeals from the judgment on bill of exceptions. The contracts, the subject of the action, read as follows:

"San Francisco, May 19, 1892.

"I hereby authorize Joost, Mertens & Company to sell for me at any time within thirty days from the date hereof, and thereafter until this authority is revoked by me in writing, for the sum of nine thousand net dollars or any less sum that I may accept for said property, that certain real property in the city and county of San Francisco [here follows description, 'being a portion of Mission Block No. 83']. And I further authorize and empower said Joost, Mertens & Company, in case of sale to accept, as my agents, a deposit of ten per cent on the selling price as part payment thereof, and to execute to the purchaser, in my behalf and as my agents, a valid contract of sale of said property upon such reasonable terms as to examination of title and consummation of the sale as are equitable, usual, and customary, and as appear more particularly in their form of 'contract receipt' printed on the back hereof, which I hereby approve and ratify. I further agree to furnish free of charge, for examination of title, such abstract of the property as I may have at the time the same is **517** sold. This authorization is irrevocable during the term of this contract.

L. J. RUFFINO,

"Administrator of the Estate of Petrona Ruffino, Deceased."

Pursuant to this authorization, Joost, Mertens & Co. made a sale to one Walker, plaintiff's assignor, and a deposit of ten

per cent of the price named (nine thousand two hundred and twenty-five dollars) was made June 10, 1892, by plaintiff with Ruffino's said agents. A contract receipt in the form referred to in the authorization was signed as follows: "L. J. Ruffino et al. [Seal] By Joost, Mertens & Company, [Seal] Agents. W. D. Walker. [Seal]" This receipt recited that the deposit was on account of the purchase price of the property (describing it). "Fifteen days are allowed to examine title and consummate sale. At the termination of the aforesaid time the balance of said purchase money is due and payable upon tender of the deed of the property sold; if the title is found defective, the purchaser is to state his objections to their title in writing, and the seller is to perfect the title within thirty days after the expiration of the time first allowed for examination or any extension thereof, unless the title cannot be perfected within said thirty days, in which event the same shall be perfected within a reasonable time thereafter. . . . If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited. . . . If the title cannot be perfected within the above-mentioned times, the deposit is to be returned. . . . The said W. D. Walker and L. J. Ruffino et al. hereby agree to comply with the conditions of this contract"; signed as above stated. L. J. Ruffino, at the time he signed the authorization, was administrator of the estate of Petrona C. de Ruffino, and so continued to be until June 27, 1895, when he died, leaving a will naming defendant as the executrix thereof, and she duly qualified August 18, 1897; Petrona was the mother of L. J. Ruffino, and he and his sisters were heirs to her estate. Mr. Mertens, one of the firm of Joost, Mertens & Co., testified that L. J. signed the contract in his own office, in San Francisco, in the presence of Mertens, on the day of its date.

1. The court found that Ruffino had "failed . . . to return said deposit or any part thereof; and no part thereof has been repaid or paid to the said plaintiff or his assignor." The ⁵¹⁸ complaint alleges failure and refusal by Ruffino "to return said deposit or any part thereof, although often requested so to do." The answer denies these allegations, and the finding of the court is challenged for insufficient evidence to support it.

It is not necessary to determine whether the evidence was sufficient to warrant the finding of nonpayment—if proof of nonpayment by plaintiff had been necessary. Where a plaintiff has proved the existence of a debt sued on—at least, within the period of statutory limitation—the burden of proving pay-

ment is on the defendant. That this is the rule at common law no one can doubt; and we have no statutory law changing it. Greenleaf states it as follows: "The defense of payment may be made under the general issue, in assumpsit; but, in an action for debt on a specialty or on a record, it must be specially pleaded. In either case the burden of proof is on the defendant, who must prove the payment of money, or something accepted in its stead, made to the plaintiff, or to some person authorized in his behalf to receive it." In Cowen & Hill's Notes to Phillips on Evidence, volume 1, side page 810, the authors, quoting from an authority and citing others, give the rule in this language: "The principle that he who alleges himself to be the creditor of another is obliged to prove the fact of agreement upon which his claim is founded, when it is contested; and that, on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it is obliged to prove the payment, is clearly one of those propositions in which every system of jurisprudence must concur in general, whatever particular rules may be adopted as to the mode and form of the allegations, by which the necessity of such proof is to be determined." The same rule has been recognized and declared frequently in this state. In *Caulfield v. Sanders*, 17 Cal. 569, the suit was upon an indebtedness alleged to be due from the defendant, who was an attorney at law. He averred in his answer that the principal part of the alleged indebtedness was due from his clients and not from him personally, and that the part for which he was personally liable had been paid. Field, C. J., delivering the opinion of the court, said: "This is in substance a denial of indebtedness for a portion of the account, and a plea of payment for the balance. ⁵¹⁹ It is, in effect, an admission as to that balance of an original liability, and throws the burden of establishing the payment upon the defendant." Further on he says: "The issue thus formed cast upon the plaintiff the necessity of separating the different charges, and of establishing a liability as to those items which were incurred for clients of the defendant, and cast upon the defendant the necessity of proving a payment of the balance."

In *Lisman v. Early*, 15 Cal. 199, the suit was on a note, and the answer pleaded payment. As proof of his defense defendant offered in evidence some receipts from the plaintiff. Plaintiff offered rebutting evidence tending to show that these receipts were for payments on an open account, and not on the

note. The defendant then proposed to show that there was no such account in existence, and to this offered evidence an objection by plaintiff was sustained. The appellate court reversed the judgment and said: "The burden of proof was really on the defendant to prove payment under the issue, and the defendants were entitled to close the proofs, at least, to rebut any new matter set up by the plaintiff": Citing authorities. In *Still v. Saunders*, 8 Cal. 281, the court said: "It appears that John W. Still was indebted to another person, and that it was agreed between him and defendant Saunders that the latter should pay this debt, and that this payment should constitute a portion of the purchase money. It lay upon the defendant to show when and how this debt was made."

Of course, it has been held by this court, as it was always held at common law, that in a complaint upon a promissory note, or other obligation to pay money, there must be an averment that the money had not been paid. This is necessary to make the complaint perfect upon its face. But it is a non sequitur to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading. See rules of pleading set forth and approved by Field, C. J., Baldwin, J., concurring, in *Green v. Palmer*, 15 520 Cal. 412, 76 Am. Dec. 492, in which, among other things, it is said: "Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved." A negative allegation is to be proved only where it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the general rule. As, for instance, in an action for malicious prosecution the plaintiff must both allege and prove want of probable cause, for the latter, although in the nature of a negative averment, is a necessary ingredient in the cause of action itself; and another instance is where the cause of action consists in the failure of the defendant to do certain work in a workmanlike manner; that the very gist of the cause of action is the allegation that the work, although done, was not done in a proper manner.

The cases cited from this court as tending to overthrow the common-law rule nearly all deal with a question of pleading, and not with a question of evidence. In two or three of them it is said that in a suit upon a promissory note the production of the note is sufficient proof of nonpayment; but this remark, no doubt, incidentally grew out of the fact that in a suit upon a negotiable promissory note the note itself must be produced, or its absence satisfactorily accounted for, in order to protect the defendant against such a wandering thing as a negotiable instrument. The only case that can be considered at all in point as establishing the opposite doctrine is that of *Farmers' etc. Bank v. Christensen*, 51 Cal. 571; but the language relied on occurs in a short opinion of less than a dozen lines, is fortified by no citation of authority, and is entirely obiter dictum. In that case the suit was upon a promissory note and mortgage. In the answer it was denied that any part of the note remained unpaid, and it was averred that it had been paid by a conveyance of the mortgaged land to the plaintiff. That being the condition of the case, the plaintiff moved for a judgment on the pleadings, and judgment was so entered. Of course, the judgment was properly reversed, because the answer raised issues ⁵²¹ upon which the defendant was entitled to introduce evidence. All that was involved in the case was disposed of in the last sentence of the opinion, which is as follows: "This denial and averment were sufficient to raise issues of fact, and the court below erred in rendering judgment for the plaintiff upon the pleadings." The statement in the former part of the short opinion that "this denial, of itself, cast the onus upon plaintiff to prove the nonpayment by production of the note or otherwise," was entirely outside of any questions legitimately before the court.

2. When the authorization and the contract receipt were offered in evidence defendant objected: 1. To the authorization, that it was void for uncertainty; that it does not describe any property, and by reason of the abbreviations used is unintelligible; 2. To the receipt, that it was not executed in the name of the person who gave the authority; that it described a different piece of property; that there was a substantial variance between the two; that the authority is a joint one and should have been executed by both partners, and that there is no proof of delivery. Upon the question of delivery we think the evidence was sufficient; it has in part already been stated.

As to the abbreviations used in the authorization we think them intelligible and their meaning readily understood. For example, the description reads: "Com at a pt on the W. line of Dolores st. dist 41 ft 2 $\frac{3}{4}$ in. from the N. line of 16th st and rung th in a W. direction 188 ft 2 $\frac{5}{8}$ in to a pt dist 28 ft 4 $\frac{7}{8}$ in. from the N. line of Dolores St. and run. th. at r. a. on the W. line," etc. Anyone familiar with land descriptions and abbreviations used in describing land would have no difficulty in supplying the terms intended by the abbreviations, especially so by the aid of the diagram attached to the document. As to the objection of uncertainty in the description of the land referred to in the authorization, and the alleged variance between the description therein and that in the receipt, there is some ground for the objection. It appears, however, that the contract and receipt were written upon a printed form used by Joost, Mertens & Co. and constituted one instrument, the receipt being printed on the back of the authorization, and its form approved in the body of the authorization. There was ⁵²² attached to the paper a diagram, referred to in the receipt. Notwithstanding the variance in the description between the two it is sufficiently clear that all parties had reference to the same property, and in any case the authority given to Joost, Mertens & Co. to receive the deposit on behalf of Ruffino is plain enough and the agreement that it should be returned on failure to make title is also plain enough. Unless the agreement was such a one as could not be enforced for other reasons, we do not think it should be avoided on the grounds of the objections above noticed.

3. Counsel for defendant asked the witness Mertens the following question: "What conversation, if any, took place between you and Mr. Ruffino, in regard to placing that property in your hands for sale?" Objection was made that the conversation is all incorporated in the contract, and was sustained. Counsel stated that he wished to prove "that it was made known to Mr. Mertens at that time that this was the property of the estate of Petrona C. de Ruffino, and that Mr. Ruffino, on behalf of the other heirs, wished to sell it, and that he acted as administrator in making this sale."

Defendant's question should have been more specific, but the scope of the objection and the subsequent offer and ruling thereon entitled defendant to be heard upon the exception. We think the case of Southern Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650, clearly demonstrates that defendant

was entitled to show by evidence that he was acting in his representative capacity, and that all parties so understood the fact to be.

It is not necessary to consider the question, so elaborately discussed in the briefs, as to when parol evidence is admissible to explain the capacity in which a party enters into an engagement, or as to whether he was acting as agent for a known principal. Later on in the trial the facts came out so far as defendant sought to obtain them by her question and offer, and it appeared that her testate was acting in his capacity of administrator of the estate which he represented, and was endeavoring to dispose of some of its property for the benefit of himself and other heirs. Defendant was not injured by the ruling, if we concede that it was wrong, and we may dismiss this branch of the case.

523 4. Appellant claims that Ruffino's contract was without authority, and for that reason it is contended that no action can be maintained upon it: Citing *Hall v. Crandall*, 29 Cal. 568, 89 Am. Dec. 64; *Lander v. Castro*, 43 Cal. 497; *Blanchard v. Kaull*, 44 Cal. 440; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231, 18 Pac. 788; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580. It is claimed that these cases overrule *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529, on which respondent relies. In this last case Conner sued Clark on a promissory note signed "R. C. Clark, trustee," and defendant offered evidence to show that he was not to pay individually, but was to pay out of a particular fund, and, of course, not to pay at all if the fund failed. The evidence was rejected at the trial and the ruling was approved here on appeal, and Clark was held personally liable. It did not appear that he had any authority to bind the beneficiaries in the trust, or that anyone beside Clark was bound by the contract. In the opinion, Story on Promissory Notes, section 63, is quoted approvingly where the doctrine is laid down that fiduciaries "acting en autre droit are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate, they act; and hence to give any validity to the note they must be deemed personally bound as makers."

Appellant relies on *Hall v. Crandall*, 29 Cal. 568, 89 Am. Dec. 64. In that case the body of the instrument sued upon read: "Eight months after date, for value received, the Auburn Turnpike Company promise to pay Hall & Allen," etc., signed "J. R.

Crandall, president; E. M. Branard, secretary." The court had in a previous case, *Hall v. Crandall*, 27 Cal. 255, 87 Am. Dec. 75, held that the note was not binding upon the company. The second action was against the directors individually, and was brought upon the note itself and not upon the wrong done to the plaintiffs by the defendants in executing it without authority, and the court said: "In all such cases the remedy against the agent is an action to recover the money, if any has been paid him, or the value of the work or labor, if any has been performed for him under the supposed contract, or special damages resulting to the plaintiff by reason of the defendant's wrong in undertaking to act for another ⁵²⁴ without authority." After stating this general principle the court adds: "If an agent in executing a contract employ terms which, in legal effect, charge himself, he may be sued upon the instrument itself as a contracting party. This is so because by the use of such terms he has made the contract his own." The opinion then proceeds to point out that from the terms employed the contract sued upon in that particular case "is manifestly the contract of the company and not the defendants. It is clear upon inspection of the instrument that the defendants intended to bind the company and not themselves, and that the plaintiff so understood it." *Hall v. Crandall*, 27 Cal. 255, 87 Am. Dec. 75, was followed in *Lander v. Castro*, 43 Cal. 497, and *Blanchard v. Kaull*, 44 Cal. 440, and for the reason that the notes sued upon did not purport to be the notes of the persons sued. And so in the cases cited from 77 California, supra, where it was held that "the defendants are not liable unless the contract contains apt words to charge them personally." The distinction between these cases and *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529, lies in the legal effect of the different terms used in the respective contracts. *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529, was not overruled by *Hall v. Crandall*, 27 Cal. 255, 87 Am. Dec. 75; on the contrary, the principle on which that case was decided is expressly recognized in *Hall v. Crandall*, 27 Cal. 255, 87 Am. Dec. 75.

5. Appellant claims that the authorization executed by Ruffino, even if personal, is void on its face and cannot be enforced: Citing *Danielwitz v. Sheppard*, 62 Cal. 339; *Jones v. Hanna*, 81 Cal. 507, 22 Pac. 883.

In each of these cases the action was by the agent to recover a commission on a contract forbidden by law, which if enforced would have resulted in direct injury to the estate. The con-

tract before us contains no such conditions. It is true that the administrator may not have been able to make a title by the decree of the court within the time stipulated, or at all, but here was nothing unlawful in his agreeing in good faith in his individual capacity to do so, nor was there anything unlawful in his receiving a deposit on the agreement. We are unable to see why Ruffino did not become personally liable for the deposit made by his authority: *Maxon v. Jones*, 128 Cal. 77, 60 Pac. 516.

6. Appellant claims that Joost, Mertens & Co. were the vendors, ⁵²⁵ and that the action should have been brought against them: Citing *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 27 Am. St. Rep. 167, 28 Pac. 796. In that case the plaintiffs signed a contract authorizing defendants to sell for plaintiffs certain real property. The contract contained the following clause: "And we will pay said Easton & Eldridge a commission of all over said sum of ten thousand dollars net, for which they may sell said property with our consent." A conditional sale was made by defendants and they received a deposit on account of the purchase, but, the conditions failing, they returned the money to the purchaser. Plaintiffs sued to recover this deposit on the theory that defendants received it as agents of plaintiffs, and that it was their money in defendant's hands the moment it was received. The court held that the relation of agency was not created by the contract, but rather that of vendor and purchaser, and that the sale by defendants was on their own account. There was evidence in the present case that the clause in the authorization relating to the payment of commissions was erased, and, in lieu thereof, it was orally agreed between Joost, Mertens & Co. and Ruffino that the former "should have [all they could get above nine thousand dollars." If this clause had been inserted in the contract, and this were an action by Ruffino's representative to recover the deposit from Joost, Mertens & Co., there would be some analogy in the cases. But this is an action brought to recover from Ruffino's representative on the theory that he received the money and did not return it when he failed to make the title.

7. The statute of limitations (Code Civ. Proc., sec. 339, subd. 1) is pleaded, and it is claimed that the action is barred by that section. This contention is upon the assumption that the contract was void and whatever liability attaches is upon an implied contract and was barred after two years. But as we have held that the liability arises on the contract, and not by impli-

cation, the claim is not barred. It is not now contended that it is barred by any other statute.

The judgment is affirmed.

Hearing in Bank denied.

ONE WHO SIGNS A WRITING AS "AGENT," "TRUSTEE," or "president" is regarded as merely describing himself, and hence is personally liable thereon: Note to Means v. Swormstedt, 2 Am. Rep. 333; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529. And the real character of the obligation intended to be assumed by such person may be shown by parol testimony: See note to Kulenkamp v. Groff, 15 Am. St. Rep. 288; Heffron v. Pollard, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165; Powell v. Construction Co., 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

PEOPLE v. SUTTER STREET RAILWAY COMPANY.

[129 Cal. 545, 62 Pac. 104.]

JUDGMENT FOR FINE—INTEREST UPON—WHEN NOT ALLOWABLE.—A general statutory provision to the effect that interest is payable on all judgments recovered within the state is not applicable to judgments penal in their nature, as where a corporation is adjudged guilty of having usurped a franchise, and fined therefor in a sum designated.

Naphtaly, Freidenrich & Ackerman and Garber & Garber, for the appellant.

W. F. Fitzgerald, attorney general, and Freeman & Bates, for the respondent.

546 GRAY, C. This action is based on section 803 of the Code of Civil Procedure, and was brought to have the franchise of defendant to maintain a street railway on Bush and other streets of San Francisco declared forfeited, and to have defendant adjudged to have usurped a franchise and fined in a sum not exceeding five thousand dollars, as provided in section 809 of the Code of Civil Procedure. The plaintiff had judgment as demanded, and the court imposed a fine on defendant of five thousand dollars. The defendant appealed to this court and the judgment was affirmed: People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 736. On the going down of the remittitur execution was issued against defendant to collect the fine. Defendant tendered the five thousand dollars and costs, but refused to pay interest on the fine, and moved that the

execution be quashed or amended by striking therefrom the portion relating to interest upon said fine. By an order duly entered the court denied the motion, and the appeal before us is from that order.

The only question for determination is, Does the judgment imposing the five thousand dollars fine on defendant come within the provisions of section 1920 of the Civil Code, providing that "interest is payable on judgments recovered in the ⁵⁴⁷ courts of this state at the rate of seven per cent per annum"? We say, without hesitation, that the case is not within the section quoted, and no interest on the fine can be recovered. It is true the provisions of law on which the action is based are found in the Code of Civil Procedure, and the action itself takes the form of a civil action, and, as to the procedure therein, it follows the rules prescribed for civil cases, and yet it is plain that the judgment adjudging the defendant to have usurped and unlawfully exercised a franchise and fining it five thousand dollars therefor is clearly penal in its nature, and the same rule as to interest should govern as applies to a judgment in any criminal case. Judgments which are penal in their nature, and have for their sole object the punishment of an offender, do not come within either the letter or spirit of said section. The section provides only for interest on "judgments recovered." The word "recovered" implies that the judgment referred to is one obtained by way of compensation and in return for an injury or a debt. The defendant in this case was not fined for the purpose of compensating the state, nor for the purpose of returning to it anything that had ever theretofore belonged to it. The judgment of fine was solely for the purpose of punishment, and was not based on any evidence of loss or damage, but rested (within the limit prescribed by the statute) solely within the discretion of the court. It would, we think, be more proper to speak of it as a sentence or judgment imposed on the defendant than to say it was a judgment recovered against him.

Again, the section in question is found in a chapter of the Civil Code entitled "Loan of Money," and in that same chapter, at section 1915, interest is defined as follows: "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." On no theory of compensation to the state for the use or detention of money can interest be allowed on the judgment. The defendant was never indebted to the state, and the money derived from the

fine imposed on defendant was not to be paid into the state treasury until it should be collected (Code Civ. Proc., sec. 809); and while the express provision is made for the disposition of the fine, there is no provision as to any interest on such fine, ⁵⁴⁸ for the good reason, no doubt, that it was never contemplated that a contention would ever be made that a fine would bear interest if not paid at the date of its imposition.

It is provided in the Penal Code, at section 1206, that "a judgment that the defendant pay a fine constitutes a lien, in like manner as a judgment in a civil action"; and at section 1214 it is provided that, "If the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action." The Code of Civil Procedure had already provided generally for judgment liens and for the issuance of executions on judgments, but it seems the legislature thought those provisions would not be applicable to judgments in criminal cases unless they were specially made so. It follows that if this was necessary as to liens and executions, a similar special enactment was also necessary to make the general provision of the Civil Code as to interest applicable to judgments of a penal nature. And the fact that no such special enactment is to be found in the Penal Code or elsewhere furnishes an argument that the legislature did not intend that judgments of the latter character should bear interest.

The fine could be inflicted upon defendant only on its being "adjudged guilty of usurping," etc.: Code Civ. Proc., sec. 809; which further illustrates that the case has a criminal aspect as to this feature of it, and is not to be distinguished in principle from the case of *State v. Steen*, 14 Tex. 396. In that case the defendant was convicted of a crime and fined two hundred and fifty dollars, and appealed to the supreme court, which affirmed the judgment. Thereafter the district attorney claimed for the state interest on the judgment. The district court discharged the defendant upon payment of the principal of the judgment without interest, from which order the state appealed, and the supreme court of Texas, in affirming the action of the court below, said: "A fine, it is true, is a judgment. In criminal law it is a pecuniary punishment imposed by the judgment of a court upon a person convicted of crime. But we do not think it such a judgment as comes within the intention of the law allowing interest upon judgments. . . . It is imposed as a punishment solely and its payment, as the term imports, is an end of the punishment. . . . There is

equity and justice in allowing interest to be recovered upon ⁵⁴⁹ judgments rendered upon pecuniary demands; but it is not easy to perceive what equity there can be in requiring punishments to accumulate by the lapse of time, or upon what principle the state can demand that fines shall accumulate in the form of interest."

We advise that the order appealed from be reversed and the cause remanded, with directions to the court below to quash the writ only as to that portion of it relating to interest upon the fine.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded, with directions to the court below to quash the writ only as to that portion of it relating to interest upon the fine.

McFarland, J., Temple, J., Henshaw, J.

INTEREST ON JUDGMENTS is not interest in the strict sense, but a fixed measure of damages for delay in payment: Wyoming Nat. Bank v. Brown, 7 Wyo. 494, 75 Am. St. Rep. 935, 53 Pac. 291. See, further, the notes to Briggs v. Winsmith, 30 Am. Rep. 47-50; O'Brien v. Young, 47 Am. Rep. 70-75; Selleck v. French, 6 Am. Dec. 197.

BAKER v. VARNEY.

[129 Cal. 564, 62 Pac. 100.]

RECEIVER—CONTRACT FOR THE APPOINTMENT OF—WHEN VOID.—A stipulation in a mortgage that, on default in the payment of the debt and on the filing of a complaint for foreclosure, the court shall, if requested by the plaintiff, appoint a receiver to take possession of the mortgaged premises and to collect the rents and profits thereof, is inoperative. Where a court has no authority under the law to appoint a receiver, none can be conferred by the consent or contract of the parties.

R. Platnauer, J. H. McKune, and McKune & George, for the appellant.

Richard Belcher, for G. W. Baker, receiver, respondent.

Albert M. Johnson, for A. E. Williams, intervenor and respondent.

F. S. Sprague and White & Seymore, for C. H. Lowell and W. A. Fountain, defendants and respondents.

564 McFARLAND, J. The plaintiff herein was appointed as a receiver in a suit brought by the intervenor for the foreclosure of a mortgage upon certain land in Sutter county, and **565** brought this action as such receiver to recover possession of certain cattle claimed by him to be the rents and profits of the mortgaged property. It is contended by appellant that the plaintiff cannot recover in this action because his appointment as receiver was void; and, as we think that this contention must be sustained, it will not be necessary to examine any of the other questions raised in the case.

Prior to the enactment of section 564 of the Code of Civil Procedure, it had been definitely determined in this state in the case of *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490, and by other cases which followed it, that in a foreclosure suit the court had no power to appoint a receiver to collect the rents and profits pending the litigation. By the second subdivision of said section 564 power was given the court in an action to foreclose a mortgage to appoint a receiver "where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt"; and this is the only provision giving jurisdiction to appoint a receiver in such a suit. In the case at bar the receiver was not appointed under that subdivision of the section, but the authority to appoint a receiver was based entirely upon a stipulation in the mortgage itself that upon default in the payment of the mortgage debt and on the filing of a complaint for foreclosure "the court shall, if requested by the plaintiff, name some disinterested person as receiver, and shall authorize such receiver to at once take possession of the mortgaged premises and collect the rents and profits thereof," etc. It was upon this stipulation alone that the alleged power of the court to appoint a receiver rests, and it is so recited in the order of appointment. Where a court has no authority under the law to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties. In such case consent of parties cannot confer jurisdiction upon a court, nor impose upon it the duty of taking care of and disposing of the property. It might as well be said that in a suit upon a promissory note, or upon any simple contract for the payment of money, a stipulation in the instrument by which the debt was **566** evidenced that the court might appoint a receiver upon suit brought would

give jurisdiction to the court to appoint such receiver; or that there could be a specific performance of a contract in any kind of a case because the parties had stipulated for a decree of specific performance. In *Scott v. Hotchkiss*, 115 Cal. 94, 47 Pac. 45, this court said: "No stipulation can confer jurisdiction upon the court to appoint a receiver in a case where the court has no authority given by law"; and though it might be said that this declaration was not necessary to the decision of that case, yet it clearly expresses what we hold the law to be. The rule is correctly stated in volume 12 of *Encyclopedia of Pleading and Practice*, pages 125 and 126, with ample authorities in the notes to sustain it, as follows: "The jurisdiction of courts having its source in the law of the land, no act of the parties can impart to a court jurisdiction which the law denies, or to a person the right to exercise judicial functions. It is accordingly a well-settled and universally applied principle that consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of the subject matter, but may confer jurisdiction of the person." We do not think that the appellant is precluded from making this point upon the ground that it is a collateral attack. Upon the record the order appointing a receiver must be considered as based solely upon the stipulation of the parties in the mortgage, and is therefore void.

The appeal in this case is from an order denying a new trial, and the order appealed from is reversed.

Van Dyke, J., Garoutte, J., Temple, J., Harrison, J., Henshaw, J., and Beatty, C. J., concurred.

Rehearing denied.

A STIPULATION IN A MORTGAGE that in case of foreclosure a receiver may be appointed does not enlarge the mortgagee's right to such an appointment, for the court will appoint a receiver in a proper case, without any such stipulation, and not in any other case, whatever the parties may have agreed. The stipulation does not authorize a receiver to be appointed if the court has no such authority given it by law: See the monographic note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 76.

MADDUX v. COUNTY BANK OF SAN LUIS OBISPO.

[129 Cal. 665, 62 Pac. 264.]

JUDGMENTS ARE NOT NECESSARILY CONCLUSIVE of every matter which the parties might have litigated in the action, as where matters occurring subsequent to its judgment might have been, but were not, pleaded or otherwise called to the attention of the court.

JUDGMENT—ESTOPPEL AGAINST ASSERTING MATTERS OCCURRING PENDENTE LITE.—A judgment by default in a suit to foreclose a mortgage does not estop the defendant from maintaining a subsequent action to recover payments made during the pendency of the former suit, but not credited to nor pleaded by him, nor otherwise called to the attention of the court.

William Shipsey, for the appellant.

W. H. Spencer, for the respondent.

665 CHIPMAN, C. Action to recover certain money alleged to have been received by defendant between the filing of a complaint by it on foreclosure and the making of the default decree, and the sheriff's sale thereunder, for which no credit was given. Defendant had judgment, from which and from the order denying his motion for new trial plaintiff appeals. The complaint sets forth the following among other facts:

Plaintiff and one Branch executed a mortgage on certain lands to First National Bank of San Luis Obispo to secure the payment of their note for eleven thousand seven hundred and seven dollars and eighty-one cents; the mortgagee subsequently assigned the note and mortgage to defendant bank, and to this latter bank Branch gave an additional mortgage to secure the payment of the same note; when the first note and mortgage were executed, and contemporaneously therewith, the mortgagee entered into a written agreement with the mortgagors by which the mortgagee agreed to release certain of 666 the lands to grantees of the mortgagors upon payment to it of certain amounts per lot of certain lands and a certain amount per acre of certain other lands; this agreement was assigned to defendant with the note and mortgage and became the agreement of defendant; on June 17, 1896, defendant commenced its action to foreclose the mortgages, at which time there was due on the note a certain sum not now disputed. Branch, this plaintiff and certain of their grantees were defendants, and Branch and Maddux (plaintiffs here) were duly served with summons, but did not appear in the action and their default

was entered, and on April 13, 1897, a judgment of foreclosure was duly made and entered by default, and on May 15, 1897, sufficient of the mortgaged lands were sold by the sheriff to pay the amount due on the note, principal and interest and costs and charges of foreclosure, and the judgment was satisfied. It is alleged that between the commencement of the suit and the foreclosure sale the sum of five thousand five hundred and sixty-four dollars was paid to defendant by grantees of Branch and Maddux and by themselves for the purpose of obtaining releases of certain of the mortgaged lands, which by the agreement aforesaid defendant agreed to credit on the mortgage note, but that it credited thereon only four thousand one hundred and fifty-six dollars and leaving a balance of fourteen hundred and eight dollars, for which no credit was given on the note or on the judgment.

The foregoing facts are sufficient to an understanding of the only point presented for decision.

Plaintiff called the cashier of defendant bank as a witness, by whom he sought to prove payments made to the bank after the foreclosure suit was commenced which were not credited on the note or on the judgment before sale. Some of these payments were alleged to have been made both before and after judgment. The evidence was refused by the court upon the objection that plaintiff was estopped by the judgment to prove any such payments. Plaintiff was also sworn as a witness in his own behalf to make similar proof, but the evidence was refused on the same grounds. Both parties seem to agree that the question is fairly presented and is the only question involved in the appeal, as it is the only question discussed.

667 No greater effect is imparted by the adjudication of a fact denied than is imparted by an adjudication of the same fact after being expressly admitted, or admitted by implication, as in the case of default: Freeman on Judgments, sec. 330, and cases there cited. A judgment by default stands on the same footing as a judgment after answer and trial with respect to issues tendered by the plaintiff's complaint. Mr. Freeman says that the general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading: Freeman on Judgments, sec. 249. He says: "It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills and equitable defenses, or either

of the parties may have acquired new rights pending the litigation, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But as long as these several matters are not tendered as issues in the action they are not affected by it. . . . The defendant must bring forward all the defenses which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed."

In some early cases in Massachusetts it was held that in a suit on a promissory note where the defendant made default he could afterward sue the plaintiff in that action for money paid but not credited on the note: *Fowler v. Shearer*, 7 Mass. 14; *Rowe v. Smith*, 16 Mass. 306; and it was so held at one time in New York: *Smith v. Weeks*, 26 Barb. 463. But in the later cases in both of those states the earlier cases were expressly overruled: *Fuller v. Shattuck*, 13 Gray, 70; *Binck v. Wood*, 43 Barb. 315, affirmed by the court of appeals. Mr. Bigelow cites several cases where it was held that partial payments made before suit cannot afterward be recovered whether the defendant in the original action made default or answered: *Bigelow on Estoppel*, 76, 77. In *Binck v. Wood*, 43 Barb. 315, the court said: "The law cannot uphold the trust and faith that allow a man to lie by, as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what in the summons or complaint he had expressly notified ⁶⁶⁸ this plaintiff he would do, namely, take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his just confidence had been betrayed." In that case, however, the partial payment claimed to have been made and not credited was made before suit was commenced. Commenting upon this case and the doctrine held in like cases Mr. Bigelow says: "This appears to be the better opinion. The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined by the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings."

I find cases decided in other states in support of the rule laid down in Massachusetts and New York, where partial payments had been made both before and after suit brought, and the defendant had appeared in the action but failed to set up the pay-

ments in defense. In these cases he was held estopped from recovering afterward by separate action.

But I find no case where the defendant did not appear and plaintiff had a default judgment, that the defendant was estopped from recovering money received by the plaintiff after the action was commenced that should have been but was not credited on the claim sued upon or taken account of in the judgment.

When the defendant fails to appear to the action, and allows his default to be entered, he admits the truth of the facts alleged in the complaint and all facts necessarily incidental to such facts and to the enforcement of the claim there set forth. Branch and Maddux, for example, in the present case, admitted that they were indebted to plaintiff in the foreclosure suit the sum claimed in the complaint when it was filed; they did not admit anything beyond this as to the indebtedness. Obviously, they did not admit that the plaintiff might take judgment for the full amount claimed, notwithstanding money might come into plaintiff's hands from third parties which it had agreed to credit on the note and which in conscience it was its duty to so credit. The best and most invariable test as to whether a former judgment is a bar, says Mr. Freeman, is to inquire ⁶⁶⁹ whether the same evidence will sustain both the present and the former action: Freeman on Judgments, sec. 259. The evidence which justified the judgment against Branch and Maddux in the foreclosure suit was their admission that at the time the complaint was filed they were indebted the amount therein claimed. The admission related to the facts as they existed at the commencement of the action. If at that time the plaintiff claimed too much, and there had been payments previously made which were not credited, it was the duty of the defendants in that action to so show by answer, as we have already seen, or they would be estopped; but the reason underlying this rule does not apply where it appears, as here, that money came into the hands of the plaintiff in the foreclosure suit, after suit brought, which it had agreed to credit but failed to do so, and of which defendants in that suit had no knowledge. The defendants might well have allowed their default to stand, relying on the plaintiff to make the proper credits before judgment, or if paid after judgment to still give the credit before enforcing the judgment. It would be unconscionable to allow the plaintiff in such a case to shield himself by claiming that the defendant is estopped to prove that the plaintiff received

the money and failed to credit it. It is true that the judgment, though for too great an amount, could be enforced unless set aside by some appropriate proceeding. But we do not think it can be used as a shield to protect the plaintiff in that action from liability for money received by plaintiff under the circumstances alleged in this case. As was said in *Barton v. Anderson*, 104 Ind. 578, 4 N. E. 420: "The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint": See, also, *Bigelow on Estoppel*, 85. See, also, *Cromwell v. Sac County*, 94 U. S. 351, for a clear statement of the rule by Mr. Justice Field.

Respondent relies upon *Woolverton v. Baker*, 98 Cal. 628, 33 Pac. 731, and *Reed v. Cross*, 116 Cal. 473, 48 Pac. 491. In both these cases it clearly appeared that the precise point in issue in the second action was litigated in the first. In both cases there were answers and the causes were fully tried. The distinction we make in the application of the principles enunciated in the two cases cited is that the facts adjudged in the foreclosure suit against Branch ⁶⁷⁰ and Maddux, so far as related to their indebtedness, and so far as the doctrine of estoppel applies to such indebtedness, were the facts as they existed when the complaint was filed. In the *Woolverton* case it was held that the plaintiff had no new cause of action for rents accruing subsequent to the judgment, because in the former action it was determined that the defendants held the land freed from any conditions set forth in the plaintiff's complaint in the last action; in other words, the very issue presented in the last case was determined against Mrs. *Woolverton* in the former case.

In the present case the plaintiff alleged that defendant received money, which under its agreement should have been credited but was not, during every month after the action was commenced, up to the month in which the sheriff's sale occurred. How far he could have established his case by evidence we cannot know, for the trial court held him estopped to make any proof of his allegations. We think the court erred and that a new trial should be granted.

It is advised that the judgment and order be reversed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Henshaw, J., Temple, J., McFarland, J.

A FORMER JUDGMENT, TO CONSTITUTE A BAR, must have been on what was actually in issue, and the determination of which was essential to the judgment: *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, 48 N. E. 128. A judgment is not conclusive of facts that were not in issue nor admitted by the pleadings: *Wilson v. Stripe*, 4 G. Greene, 551, 61 Am. Dec. 138. Compare *State v. Branch*, 134 Mo. 592, 56 Am. St. Rep. 533, 36 S. W. 226; *Freeman v. McAninch*, 87 Tex. 132, 47 Am. St. Rep. 79, 27 S. W. 97; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493.

JUDGMENTS BY DEFAULT AS RES JUDICATA are considered in the note to *Dunlap v. Steere*, 27 Am. St. Rep. 148.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

**FLORIDA, CENTRAL AND PENINSULAR RAILROAD
COMPANY v. FOXWORTH.**

[41 Fla. 1, 25 South. 338.]

PLEADING — REFERENCE TO COUNTS — EFFECTIVENESS OF.—It is permissible to refer to, and thereby make a part of one count, the whole or a part of the allegations of another count in the same declaration. The practice, however, is not to be commended, and, to be effective, the reference should be definite and certain.

APPEAL—WITNESSES.—AN OBJECTION TO A QUESTION propounded to a witness, not insisted upon in the trial court, cannot be considered on appeal.

NEGLIGENCE CAUSING DEATH—WIDOW'S ACTION FOR DEATH OF HUSBAND—CONTRIBUTORY NEGLIGENCE—EFFECT OF—DIMINUTION OF DAMAGES.—Under the statutes of Florida, a widow may recover damages for the death of her husband, caused by the wrongful act, negligence, or carelessness of a railroad company; and, in such action, contributory negligence on the part of the deceased operates, not as a bar to the plaintiff's recovery, but merely in diminution of damages.

STATUTES—CONSTRUCTION—RE-ENACTMENT OF ACT REPEALED.—When a repealing act re-enacts substantially the provisions of the act repealed, the latter is not thereby destroyed, or interrupted, in its operation, but remains in full force.

INSTRUCTIONS.—THE EXPRESSION "GROSS NEGLIGENCE," in a charge to a jury, does not of itself define, nor does it include, that extreme degree of negligence which is wanton, or reckless of injurious consequences. Its use, therefore, is not erroneous, where the jury are instructed not to give exemplary damages, and other instructions given direct an apportionment of damages in case of contributory negligence.

INSTRUCTIONS — ASSUMING DISPUTED FACTS AS PROVED.— It is error to give an instruction which assumes any disputed fact as proved. An instruction which merely asserts an abstract legal proposition, without attempting to apply it to the

facts of the particular case on trial, but leaving it to the jury to make the application to the facts as found by them, does not assume as proved any matter of fact in dispute.

RAILROADS—BACKING TRAINS IN VILLAGE—NEGLIGENCE.—It is negligence for a railway company to back a train without a brakeman at the rear end as a lookout across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks.

RAILROADS—BACKING TRAINS IN VILLAGE—DUTY—NEGLIGENCE.—A railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities, and any neglect of any precautions, proper with respect to the peculiar circumstances of the locality, constitutes negligence, although the road was in operation before the village came into existence.

NEGLIGENCE CAUSING DEATH—ACTION FOR—CONTRIBUTORY NEGLIGENCE—EFFECT OF—DIMINUTION OF DAMAGES.—Under the statutes of Florida, which make contributory negligence, in actions for personal injuries, operate merely in diminution or reduction of damages, the person injured, or, in case of his death, his widow, is entitled to recover, where the defendant's negligence was one of the proximate contributing causes to the injury, although the injured person's negligence was greater than that of the defendant, but in all cases where the negligence of the plaintiff and the defendant produces the injury, the plaintiff's damages are to be diminished by the jury in proportion to the default attributable to such injured person.

RAILROADS—CROSSING TRACK IN STREET—TRESPASSERS.—A person is not a trespasser who crosses a railroad track in a street of a village at a place other than a public crossing or the intersection of other streets.

RAILROADS—INJURY NEAR PUBLIC CROSSING—LIABILITY.—If a person is injured by moving cars while attempting to cross a railroad track in a village, and the injury occurs so near a public crossing that the means required to be adopted, by those operating the train, to enable a traveler to cross in safety at the public crossing, if carried out, would have enabled the person injured to cross in safety at the place of the accident, the liability of the railroad company will be measured by the legal principles applicable to public crossings.

RAILROADS—DUTY IN BACKING CARS IN TOWNS OR VILLAGES.—It is the duty of a railroad company, while operating its trains in the streets of towns and villages, and in the immediate vicinity of public crossings, to keep a lookout when making flying switches, or backing cars by the "kicking back" process, and, when it is apparent, or when, in the exercise of reasonable diligence commensurate with the surroundings it should be apparent to the company that a person on its track, or about to get thereon, is unaware of his danger, or cannot get out of the way, it becomes the duty of the company to use such precautions by warnings, applying brakes, or otherwise, as may be reasonably necessary to avoid injury.

RAILROADS—INJURY FROM MOVING CARS IN TOWNS OR VILLAGES—CONTRIBUTORY NEGLIGENCE—LIABILITY.—It is the duty of a person who attempts to cross a railway track in a town or village to look and listen before crossing, and his failure to do so is contributory negligence, but this, under the statute of Florida, does not exonerate the railway company from liability,

in case of injury, where it could have been prevented by the exercise of reasonable and proper care, after the discovery of such person's negligent act, or where it could have discovered it by the exercise of such care, in time to avoid the injury. If the company, by failing to ring a bell, blow a signal, or station a lookout, directly contributed to the injury, it would, under such statute, be answerable in damages, to be diminished in proportion to the contributory negligence of the injured party, but if such negligent omissions on its part did not directly contribute to the injury, it would not be liable.

RAILROADS—"KICKING CARS"—DUTY OF COMPANY.—

The dangerous practice of "kicking cars," or making flying switches, in populous localities and near crossings, imposes upon railway companies the duty of stationing a lookout upon the rear of the cars, the equivalent of which is not accomplished by ringing the engine bell.

RAILROADS—NOTICE THAT TRAIN IS APPROACHING—

DUTY CONCERNING.—A statute requiring a railway company to ring its engine bell before crossing the streets of an incorporated town does not define its duty, in this respect, outside of incorporated towns. It is a general rule that those in charge of a train must measure their precautions by, and make them reasonably commensurate with, the conditions and circumstances by which they are surrounded, and they must, therefore, independently of statute, give notice of its approach at all points of known or reasonably apprehended danger.

DAMAGES—ACTION BY WIDOW FOR DEATH OF HUSBAND—

MENTAL ANGUISH.—In an action by a widow to recover damages for the death of her husband, caused by the alleged negligence of the defendant, she is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the injury.

DAMAGES—PROPER ELEMENTS OF, IN ACTION BY

WIDOW FOR DEATH OF HUSBAND.—In estimating the pecuniary loss sustained by a widow in consequence of the death of her husband caused by the alleged negligence of the defendant, the jury may properly take into consideration her loss of his comfort, protection, and society, in view of his character, habits, and conduct as husband, and of the marital relations between the parties at the time of and prior to his death, his services in assisting her to care for the family, and the loss of support which he was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future, such earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death. All these elements are to be based upon their probable joint lives. She is also entitled to compensation for the loss of whatever she might reasonably have expected to receive in the way of dower or legacies from his estate, in case her life expectancy be greater than his. The sum total of all these elements is to be reduced to a money value, and its present worth to be given as damages.

DAMAGES—MEASURE OF, FOR NEGLIGENCE CAUSING

DEATH—DISCRETION OF JURY.—In an action to recover damages for a death caused by the wrongful act or negligence of the defendant, the jury, in considering the proper elements of damages, may exercise a reasonable discretion as to the amount to be

awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information.

Action brought by the appellee, Sarah A. Foxworth, against the railroad company, to recover damages for the death of her husband, who, it was alleged, was negligently run over by the defendant's cars, in the town of Callahan, and killed. The plaintiff, in pleading, referred to and incorporated into subsequent counts the allegations of previous counts by reference merely. A demurrer was interposed on the ground that such subsequent counts were incomplete and that such pleading was not permissible, but it was overruled. There was a judgment for the plaintiff and the company appealed. The railroad track, where the accident occurred, divided the town of Callahan, stores and business houses being located upon each side of the track. The deceased, who was between fifty and eighty years of age, attempted to walk diagonally across the railroad track, within the town, and within ten to fifty feet of where a public road crossed the track, going from the postoffice to his home, with an open umbrella to protect him from rain, held in such a position as to shut off his view of a train approaching, and was struck by a car propelled by the "kicking back" process almost immediately after entering upon the track, and before he could cross it, he being at the time apparently unaware of the approach of a train. There was much conflict of evidence upon almost every point. There was evidence tending to show that, even after the car struck the deceased, his life might have been saved by a person on the rear end of the car. Upon the question of negligence, the court, at the plaintiff's request, charged the jury that: "1. It is gross negligence to back a train without a brakeman at the rear end as a lookout, across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks. . . . 3. A railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities, and any neglect of any precautions, proper in the peculiar circumstances of the locality, constitutes negligence." The fourth instruction is stated in the opinion. The fifth instruction informed the jury that the company was liable, notwithstanding contributory negligence on the part of the deceased, for its failure to use proper means to avoid the accident after it saw, or in the exercise of due care, should have seen, the peril surrounding the deceased at the time of the accident. The eighth instruction informed the jury that, "although one

injured by a collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet, if the accident was directly caused by negligence of the company, the latter will be liable." The eleventh instruction held that the company would be guilty of negligence, although the engineer rung the bell, if it failed to exercise all proper means to avoid the accident after it saw, or, in the exercise of due care, should have seen, the dangerous situation of the deceased. The court, upon its own motion, instructed the jury that, if the injury was due solely to the neglect of the plaintiff's husband, the company would not be liable, but that, if it was due to the negligence both of the deceased and the company, the plaintiff might recover, her damages, however, to be diminished in proportion to the negligence of the deceased. The defendant requested the court to instruct: "5. That it was the duty of the deceased before attempting to cross the track, to look, and that if his failure to do so was the proximate cause of the injury, the plaintiff could not recover. . . . 10. That the law requiring bells to be rung on the engine of a train before crossing the streets, applied only to incorporated cities; and that, if the place where the accident occurred was not upon the street of an incorporated city, then there was no duty to ring the bell. . . . 13. That chapter 4071 of the Laws of Florida did not apply to this case, the same having been passed subsequent to the facts alleged in the declaration. . . . 17. That, if the negligence of the deceased was gross, the plaintiff could not recover, but that if it was slight, as compared with the defendant's negligence, the company would be answerable." These instructions, requested by the defendant, were refused. Upon the question of damages, the court, on behalf of the plaintiff, instructed: "6. That the plaintiff's deprivation of her husband's society, comfort, and protection were proper elements to be considered in awarding damages." The disposition made, in the opinion, of the seventh, ninth, tenth, and fourteenth instructions, upon the subject of damages, given on behalf of the plaintiff, and also of the second instruction given by the court of its own motion, and which concerned the measure of the plaintiff's damages, considered in connection with the views expressed by the court, renders it unnecessary to make any further statement concerning them.

John A. Henderson and John C. Cooper, for the appellant.

A. W. Cockrell & Son, for the appellee.

⁵⁵ CARTER, J. 1. While we do not commend the practice, we think it is permissible in common-law pleading to refer to, and thereby make a part of one count, the whole or a part of the allegations of another count in the same declaration. To be effective, however, the reference should be definite and certain: 1 Chitty's Pleading, 16th ed., 429; *Dent v. Scott*, 3 Har. & J. 28; *Freeland v. McCullough*, 1 Denio, 414, 43 Am. Dec. 685; *Crookshank v. Gray*, 20 Johns. 344. This rule being fully complied with in this case, the first assignment of error fails.

2. The question propounded to the witness Dean was objected to in the trial court upon one ground only, that it was in form argumentative. In this court it is argued that the question was objectionable because it sought to obtain a mere opinion from the witness. We cannot consider this objection because we are confined to those insisted upon in the trial court: *Tuten v. Gazan*, 18 Fla. 751; *Jacksonville etc. Ry. Co. v. Peninsular Land Mfg. Co.*, 27 Fla. 1, 9 South. 661. It is not suggested by appellant in what respect the question is argumentative, nor do we perceive that it is, consequently the second assignment of error is not well taken.

3. In considering other assignments of error it will be necessary for us to determine whether, in this case, contributory negligence on the part of the deceased will operate as a bar to plaintiff's recovery, or merely in ⁵⁶ diminution or reduction of damages. In *Louisville etc. R. R. Co. v. Yniestra*, 21 Fla. 700, it was held that, by the common law, a plaintiff could not recover damages for personal injuries caused by the joint negligence of himself and the defendant; that in such cases plaintiff could not recover upon proof that the injuries were essentially caused by the negligence of a defendant; but only by showing that his own negligence did not contribute in any degree to produce the injury received by him. The same principle was stated and applied in *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 17, 11 South. 506. In the former case the chief justice suggested that this rule was inequitable and unjust, and that legislation was needed apportioning the damages where the negligence of the plaintiff and the defendant both contributed to the injury. At the next session of the legislature this suggestion was acted upon, and chapter 3744, approved June 7, 1887, entitled "An act to apportion the damages in actions against railway companies by persons and employes, and to provide for such recovery of dam-

ages against said railway company by its employés," was enacted, whereby in section 1 it was provided: "That no person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him." Chapter 4071, entitled "An act defining the liabilities of railroad companies in certain cases," approved May 4, 1891, provides by section 2 that "no person shall recover damages from a railroad company for injury to himself or his property where the same is done ⁵⁷ by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him," and, by section 4, "that chapter 3744 of the Laws of Florida, approved June 7, 1887, be, and the same is hereby, repealed." This suit was instituted April 23, 1891, by a widow to recover damages for the alleged negligent homicide of her husband in December, 1890, and the trial was had in November, 1891. Chapter 3439, approved February 28, 1883, authorizing suits of this character to be brought, is entitled "An act fixing the liability of persons and corporations for damages resulting from the death of anyone, caused by the wrongful act, negligence, carelessness, or default of such persons or corporations, or the agents thereof," and provides, in section 1, that "whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness, or default of any individual or individuals, or by the wrongful act, negligence, carelessness, or default of any corporation, or by the wrongful act, negligence, carelessness, or default of any agent of any corporation when acting in his capacity of agent of such corporation, and the act, negligence, carelessness, or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then, and in every such case, the person or persons who, or corporation which, would have been liable in damages, if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as make it in law amount to a felony"; and, in section 2, "every such action shall be brought by and in the name of

the widow ⁵⁸ or husband, as the case may be, and where there is neither a widow or husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither a widow or husband, or minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support, and where there is neither of the above class of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed; provided, that any action instituted under this act by or in behalf of a person or persons under twenty-one years of age, shall be brought by and in the name of a next friend."

It is here contended: 1. That neither the provisions of section 1 of chapter 3744, nor of section 2 of chapter 4071, apply to this case, because they by express terms are applicable only to cases where the injured party is himself the plaintiff, and have no reference to cases where death has ensued and other parties are maintaining the action. It is admitted, however, that if death had not ensued, and the action was being maintained by plaintiff's husband, his contributory negligence, unless it was the sole proximate cause of his injury, would not bar his right of action since the enactment of these statutes, but would require the reduction or diminution of the damages to be recovered by him. As these statutes declare and limit the right of the deceased, had he lived, to recover damages for the injuries received by him, it is clear that they apply to actions brought by the widow under the provisions of chapter 3439, because she is thereby authorized to maintain an action only where the wrongful ⁵⁹ "act, negligence, carelessness, or default is such, as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof": *Duval v. Hunt*, 34 Fla. 85, 15 South. 876. 2. That chapter 3744 was expressly repealed by chapter 4071, which became effective after the injury to plaintiff's husband, but before the trial in the circuit court. It is admitted by counsel for appellant that the language of section 1 of chapter 3744 is identical with that of section 2 of chapter 4071. This is not literally true, as will be observed by a comparison of the two sections, but we think that chapter 4071, which expressly repeals chapter 3744, re-enacts substantially the provisions of

section 1 of the latter act, and under a well-settled rule of construction, the provisions of that section are not thereby destroyed or interrupted in their operation, but continue in full force: *Forbes v. Board of Health*, 27 Fla. 189, 26 Am. St. Rep. 63, 9 South. 446.

4. It is urged that the first instruction given at plaintiff's request was erroneous, because: 1. The use of the term "gross negligence" meant that the conduct of defendant in doing the acts constituting the "gross negligence" defined were wanton and reckless, and that the injury was occasioned by the sole negligence or fault of the defendant, and was, therefore, inapplicable to any evidence in the case. In other charges given by the court to the jury they were instructed not to give plaintiff exemplary damages, and that they must apportion the damages, in case they found contributory negligence on the part of plaintiff's intestate; from which it was clearly made to appear to the jury that the term was not used in the sense claimed by appellant. In *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 32 Am. St. Rep. 17, 11 South. 506, we held that the use of the expression "gross negligence," ⁶⁰ in a charge to a jury, does not of itself define, nor does it include, only that extreme degree of negligence which is wanton or reckless of its injurious consequences, and to which the defense of contributory negligence does not obtain and cannot be held as having been intended to submit the case to a jury for consideration as one of that character, and particularly so where other charges have recognized contributory negligence as a defense to the action. 2. It is also insisted that the charge assumes certain facts as proven which were disputed in evidence, viz., that there was no brakeman on the rear of the train; no flagman at the crossing, and that the train was backing across the main thoroughfare of a village. We do not think the charge is subject to that construction. It merely asserts an abstract legal proposition, without attempting to apply it to the facts of the particular case on trial, leaving it to the jury to make the application to the facts as found by them. There was evidence tending to show that there was no brakeman on the rear of the train, nor flagman at the crossing, and that the train was backing across the main thoroughfare of a village, but no intimation from the court that this evidence was true, or that these facts were proven. 3. It is admitted that the proposition of law asserted in the charge is correct, but criticised as being inapplicable to the evidence in the case on trial. Giving to the word "gross"

the meaning before stated, we think the charge was substantially correct as a legal proposition. The principle, in almost identical language, was held in *Cooper v. Lake Shore etc. Ry. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306, to be correct; it finds some support in *Florida Cent. etc. R. R. Co. v. Williams*, 37 Fla. 406, 425, 20 South. 558, and the principle is sustained by many authorities: ⁶¹ 2 Wood on Railroads, sec. 323; 3 Lawson's Rights, Remedies, and Practice, sec. 1187; 2 Shearman and Redfield on Negligence, sec. 471; Patterson's Railway Accident Law, sec. 171; *Kentucky Cent. Ry. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, and note; Beach on Contributory Negligence, sec. 194. And we think the charge was applicable to the evidence in the case. There was testimony that the deceased was struck by a backing train while attempting to cross defendant's track laid in and along the only prominent street in the village of Callahan, within a few feet of, and practically at, a public crossing; that the train was running at a speed of at least five miles an hour; that the engine bell was not rung, no flagman stationed at the crossing, nor lookout upon the rear of the train, and that the backing cars were cut loose from the engine before the collision.

5. The third instruction for plaintiff also contained a correct abstract proposition, and the court did not err in giving it. It has been approved in *Norfolk etc. R. R. Co. v. Burge*, 84 Va. 63, 4 S. E. 21, and the same principle is substantially stated in *Florida Cent. etc. R. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558, in the following language: "Where steam railroads are laid and operated along or across the streets of populous towns or communities where numerous people of all conditions and descriptions are aggregated or likely to be, it is their duty to operate the dangerous implements used by them with the utmost degree of care, strictly commensurate with the circumstances by which they are there surrounded, in order to avoid injury to others." We do not appreciate the force of appellant's contention that it is exempt from the principles of law embraced in these instructions, because its road was in operation before the village came into existence. ⁶² Its duty in respect to operating its trains is necessarily dictated and measured by the exigencies of the occasion, or in the light of the condition of things at the place where, and time when, the accident happened: *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Florida Cent. etc. R. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558. The building up of a town along and on its line, causing

the operation of its road to be attended with greater danger to others, imposed a duty upon appellant to exercise such additional care as the circumstances reasonably demanded.

6. The court erred in giving the fourth instruction for plaintiff. The court has no right to invade the province of the jury, by assuming as proven facts matters which are in dispute upon the trial. This instruction informed them that "if pushing a train increased the risk of plaintiff's husband, it was negligence on the part of the defendant not to give timely notice of what he was doing," thereby assuming that defendant did not give timely notice, and confining the jury to an investigation of one question only—whether pushing the train increased the risk of the deceased. The defendant contended that it did give timely notice by ringing the engine bell, and many witnesses testified that the bell did ring. Plaintiff's testimony was to the effect that the bell did not ring, and the court should not have assumed by this charge that timely notice was not given: *Louisville etc. R. R. Co. v. Yniestra*, 21 Fla. 700; *Ashmead v. Wilson*, 22 Fla. 255; *Doyle v. State*, 39 Fla. 155, 63 Am. St. Rep. 159, 22 South. 272.

7. Several objections presented, and most earnestly insisted upon by appellant to the fifth instruction given at plaintiff's request, are fully and completely answered by the statement that the provisions of section 1 of chapter ⁶³ 3744 of the act of 1887 apply to this case; and that under these provisions contributory negligence is not a complete defense in bar, but operates only in reduction or diminution of damages. The plaintiff, under these provisions, is entitled to recover if defendant's negligence was one of the proximate contributing causes to the injury of the deceased, notwithstanding the deceased's negligence was greater than that of the defendant. This statute does not introduce into this state the Illinois doctrine of comparative negligence, nor that prevailing in Tennessee, nor does it introduce in its entirety that prevailing in the state of Georgia; consequently, the decisions cited from those states are inapplicable to this case, upon a proper construction of our statutes. It is true that our statute is taken almost literally from similar provisions in the Georgia code: *Duval v. Hunt*, 34 Fla. 85, 15 South. 876; *Florida Cent. etc. R. R. Co. v. Williams*, 37 Fla. 406, 20 South. 558; but these provisions of the Georgia code are construed in connection with, and are limited by, another provision of the same code which was omitted from our statute, viz.: "If the plaintiff, by ordinary care,

could have avoided the injury to himself caused by the defendant's negligence, he cannot recover at all": *Macon etc. R. R. Co. v. Johnson*, 38 Ga. 409; *Savannah etc. Ry. Co. v. Stewart*, 71 Ga. 427. The plain construction of our statute, in the absence of a provision similar to the one quoted, is that plaintiff is not debarred from recovering unless the injury was caused entirely by his own negligence, or by his consent; but that in all cases where the negligence of the plaintiff and defendant produces the injury, the plaintiff's damages are to be diminished by the jury in proportion to the default attributable to him. This being the proper construction of the statute, ⁶⁴ it follows that the court committed no error in giving the first paragraph of its own charge, or in refusing the thirteenth and seventeenth instructions requested by defendant.

(2.) The eighth instruction given on behalf of plaintiff was erroneous in using the word "remotely." The failure to exercise ordinary care and prudence might in some instances contribute remotely to an injury, while in others it might not only contribute directly, but very greatly, to the injury. The degree of negligence attributable to the plaintiff is a question to be considered by the jury in assessing damages, and where the facts are disputed, as in this case, the court should not assume in its instructions that the negligence of the deceased, if any, contributed only remotely to the injury. In other respects the instruction is correct, and the word "remotely" should be eliminated upon another trial.

(3.) The appellant contends that the fifth instruction given at plaintiff's request is erroneous, because it held defendant liable for failure to use proper means to avoid the accident after it saw, or, in the exercise of due care, should have seen, the peril surrounding the deceased on defendant's railroad track. It is admitted that the charge correctly stated the law applicable in this respect to public crossings over defendant's track, but it is insisted that the injury occurred below the crossing, that deceased was a trespasser, that defendant was under no obligation to keep a lookout for trespassers, and can only be held liable for a failure to exercise care in avoiding injuries to trespassers when and after it actually sees the trespasser on its track. According to the testimony, the collision occurred within fifty feet of the public crossing; by some of the witnesses it occurred within ten feet thereof, and all the evidence tended to show that ⁶⁵ the deceased was injured while endeavoring to cross the track where it was laid in the most prominent

street in the village. A person is not a trespasser who crosses a street at a place other than a public crossing, or the intersection of other streets: Brunswick etc. R. R. Co. v. Gibson, 97 Ga. 489, 25 S. E. 484, 5 Am. & Eng. R. R. Cas., N. S., 441. And if the injury occurred so near a public crossing that the means required to be adopted by those operating the train to enable a traveler to cross in safety at the public crossing, if carried out, would have enabled the person injured to cross in safety at the place of the accident, we think the liability of the defendant will be measured by the legal principles applicable to public crossings: Baltimore etc. Ry. Co. v. Owings, 65 Md. 502, 5 Atl. 329, 28 Am. & Eng. R. R. Cas. 639. Whatever may be the rule as to the duty of a railroad company to keep a lookout for trespassers upon its track in general, we hold that in the streets of towns and villages, and in the immediate vicinity of public crossings, the company is bound to keep a lookout when making flying switches, or backing cars by the "kicking back" process, and that when it is apparent, or when in the exercise of reasonable diligence commensurate with the surroundings it should be apparent, to the company that a person on its track or about to get on its track under such circumstances is unaware of his danger or cannot get out of the way, it becomes the duty of the company to use such precautions by warnings, applying brakes or otherwise, as may be reasonably necessary to avoid the injury; for, as said by this court in Florida Cent. etc. R. R. Co. v. Williams, 37 Fla. 406, 20 South. 558, "though the plaintiff may have been guilty of contributory negligence in stepping upon the track immediately in front ⁶⁶ of a moving engine, yet the defendant [under the act of 1887] is still liable for the injury if it could have prevented it by the exercise of reasonable and proper care after the discovery of the plaintiff's negligent act, or if it could have discovered it by the exercise of such care, in time to avoid the injury": Norfolk etc. Ry. Co. v. Burge, 84 Va. 63, 4 S. E. 21; Patton v. East Tennessee etc. Ry. Co., 89 Tenn. 370, 15 S. W. 919.

(4.) From what has been said it is apparent that the court did not err in refusing the fifth instruction requested by the defendant. True, it was the duty of the deceased to look and listen before crossing defendant's track, and if he failed to do so it was negligence on his part contributing to his injury, yet if the defendant, by failure to ring a bell, blow a signal or station a lookout, directly contributed to the injury, it would

be liable to damages, diminished in proportion to deceased's contributory negligence. If, however, the failure of defendant to ring the bell, blow the signal or station a lookout, though negligent omissions on its part, did not directly or proximately contribute to deceased's injury, the defendant would not be liable.

7. There was no error in giving the eleventh instruction requested by plaintiff. In the preceding paragraph we have considered all objections suggested by appellant, except the one which claims that defendant's duty under the circumstances of this case would have been completely performed by ringing the bell in the manner indicated by this instruction. The courts have frequently condemned the dangerous practice of "kicking cars," or making flying switches, in populous localities and near crossings, and have almost uniformly held that the increased hazard of these practices over the ordinary ⁶⁷ manner of railway operation imposes upon the company a duty to station a lookout upon the rear of the cars, the equivalent of which is not accomplished by ringing the engine bell: 2 Wood on Railroads, sec. 323, p. 1517; 3 Lawson's Rights, Remedies, and Practice, sec. 1187; 2 Shearman and Redfield on Negligence, sec. 471; Beach on Contributory Negligence, sec. 194. This precaution is much more effective than the simple ringing of a bell, and if persons are injured on or near crossings, or other places much frequented, where by the exercise of this precaution the injury could have been avoided, the company will be liable. If it be true, as contended by plaintiff, that the deceased when injured was crossing defendant's track, oblivious of the approach of a train, holding an open umbrella in such a manner as to obstruct his view of an approaching train, and a lookout stationed upon the rear of the car, in the exercise of reasonable diligence, could and would have discovered the plaintiff's perilous situation in time to avert the collision by warnings, application of brakes or otherwise, then the failure to put a lookout on the rear of such train was negligence on defendant's part, contributing directly to the injury, and the plaintiff would be entitled to recover; the jury diminishing the damages in proportion to the default attributable to the deceased: Florida Cent. etc. R. R. Co. v. Williams, 37 Fla. 406, 20 South. 558.

9. The tenth instruction requested by defendant was properly refused. It is argued that the statutes then in force (McClellan's Digest, sec. 33, p. 287), only required defendant to ring its engine bell before crossing the streets of an incorporated town.

This statute does not purport to define defendant's duty in this respect outside of incorporated towns, but leaves that to be determined ⁶⁸ upon common-law principles. Independently of statute, it is the duty of those in charge of a train to give notice of their approach at all points of known or reasonably apprehended danger. This follows from the general rule requiring them to measure their precautions by, and to make them reasonably commensurate with, the conditions and circumstances by which they are surrounded: *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181, 32 Am. & Eng. R. R. Cas. 1; *Winstanley v. Chicago etc. Ry. Co.*, 72 Wis. 375, 39 N. W. 856, 35 Am. & Eng. R. R. Cas. 370; *Loucks v. Chicago etc. Ry. Co.*, 31 Minn. 526, 18 N. W. 651, 19 Am. & Eng. R. R. Cas. 305; *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884; *Durkee v. Delaware etc. Canal Co.*, 88 Hun, 471, 34 N. Y. Supp. 978; *Delaware etc. R. R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569; *Louisville etc. R. R. Co. v. Commonwealth*, 13 Bush, 388, 26 Am. Rep. 205; *Gates v. B. C. R. & M. R. Co.*, 39 Iowa, 45.

10. By the common law no damages were recoverable for the death of a human being. We are, therefore, without precedents as to the measure of damages in cases of this character, other than those based upon the construction of statutes varying in their language. A great majority of the courts of this country have held that in actions of this character the loss of the society of the deceased cannot be considered in estimating damages. The basis for this array of precedents is the opinion of the English court, construing Lord Campbell's act, in *Blake v. Midland Counties Ry. Co.*, 16 Jur. 562. We have examined a multitude of these cases, and in none of them have we found any reason given for disallowing this element, except in Pennsylvania ⁶⁹ *R. R. Co. v. Zebe*, 33 Pa. St. 318, and the decision in this case is confessedly based upon, and the reasons given are practically those of, the English case. In the Pennsylvania case the main question considered was whether damages for mental suffering or wounded feelings could be allowed, and incidentally the court held that loss of society falls within the same category with mental suffering and should be disallowed. The English case, though confined entirely to the question of mental suffering, has been generally cited as authority for excluding damages for loss of society and protection of a husband. The reasoning of that decision is based upon four propositions: 1. The title

of the act, "An act for compensating the families of persons killed by accident," not "for solacing their wounded feelings"; 2. The provision requiring the jury to divide between the persons for whose benefit the action was brought the amount recovered in such shares as they thought proper, and the impracticability of estimating and dividing the damages for mental anguish of and between the numerous persons for whose benefit the action is brought; 3. Because the language of the act seemed more appropriate to a loss of which some estimate might be made by calculation than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings; and 4. "If a jury were to proceed to estimate the relative degrees of mental anguish of a widow and twelve children from the death of the father of the family, a serious danger might arise of damages being given to the ruin of the defendants." In the Pennsylvania case it is said that such damages are speculative and fanciful, and it is there asserted that the great merit of the English rule is that "it is one of equality, compensating the rich and the poor, the refined and the cultivated, and those less⁷⁰ so, by the simple standard of pecuniary loss." While our statute has several features in common with Lord Campbell's act, it is essentially different in many important particulars. Unlike the English statute, it is not one for "compensating families," but one "fixing the liability of persons and corporations for damages resulting from death," etc. Our statute, unlike the English one, by giving a right of action to the administrator of the deceased, imposes the liability whether there be a family to compensate or not. Its effect was to abrogate the common-law rule, for which, if any reason ever existed, the world has long since outgrown it, denying damages for human life, and to affix a penalty by an award of pecuniary damages for a careless or wrongful act resulting in another's death. In authorizing suits to enforce this liability, our act gives the right to those who are supposed to suffer most by the death of the deceased, but on no account does the action fail for want of a person to sue, as with Lord Campbell's act. Other points of dissimilarity between them are: Under the English statute the suit is brought by the administrator for the benefit of the beneficiaries, while the beneficiaries sue directly under our statute. Under the English statute the jury are required to apportion or divide the recovery among all the beneficiaries, while under ours no division is made, by the jury; and, indeed, if there be a husband or wife surviving, the exclusive right of

action inures to him or her without reference to other members of the family. And so with minor children and dependents, the existence of a higher class of persons authorized to sue in the order named in the statute debarb all other classes from any right of action themselves, or from participation in the recovery by the higher class: *Duval v. Hunt*, 34 Fla. 85, 15 South. 71 876. In the *Duval-Hunt* case we held that where the suit was brought by dependents, their recovery was limited to an amount equal to the present worth of a future support for plaintiff, estimated upon the basis therein mentioned. This view is entirely consistent with, and plainly conformable to, the nature and extent of the damages proximately suffered by one dependent upon the deceased for a support only, because he has lost nothing by the death of the deceased except the support which he would have received had deceased lived; but it was not thereby determined, as insisted upon by the appellant, that the same rule for assessing damages for a dependent would apply to a suit by the wife or any other person authorized by the statute to sue. Our statute requires the jury to give such damages "as the party entitled to sue may have sustained by reason of the death of the party killed," not such damages as the deceased might have recovered had he lived, as contended by appellee. It is clear, therefore, that a widow is not entitled to recover for the pain and suffering of the deceased, because that is not a damage sustained by her, but by the deceased, and dies with his person, unless an administrator can recover therefor in a suit by him under the statute, as to which we express no opinion. The statute failing to declare what particular elements enter into the damages sustained by a widow by reason of the death of her husband, and the common law furnishing no guide for estimating damages sustained by one from the death of another, we must necessarily have recourse to the general rules governing the assessment of damages in other actions, and among the first we find that "the object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position so far as money can do it, as he would have been" 72 if . . . the tort had not been committed": *Sedgwick on Damages*, sec. 30. Another is that the damage to be recovered must always be the natural and proximate consequence of the act complained of: *Sedgwick on Damages*, sec. 122. Applying these principles to this case, it is proper to inquire, Who is the plaintiff? Of what wrongful act does she complain? What has been the natural and proximate

consequence to her; or, stated differently, what has she directly lost by reason of this wrongful act? The answers are not difficult to give. She is a widow complaining of the death of her husband by the wrongful act of another, and she has lost all the rights and benefits which she would have had a legal claim to receive during the probable joint lives of herself and husband, and those accruing after his death had she survived him. Chief among those accruing to her during their joint lives are the comfort, society, protection and support of the husband. They are all eloquently expressed in that portion of the marriage ceremony constituting the contract between them, whereby the man is required "to love her, comfort her, honor and keep her in sickness and in health." There can be no question that the wife's right to the society of the husband is a recognized legal right, as much so as the right to his support. When one of the parties dies by the wrongful act of another, the consequences are not merely the annulment of a contract, or the ending of a partnership organized for pecuniary gain; but the dissolution of the only status known to the law in which the companionship and society of the parties to each other is so essential that the relation will be annulled if that society be willfully withdrawn. The word "husband" or "wife" disassociated from all idea of companionship has but an empty sound. The Pennsylvania court in a later case (Pennsylvania ⁷³ R. R. Co. v. Goodman, 62 Pa. St. 329) recognizes the injustice of denying compensation for companionship of husband and wife in cases of this character, by holding that the husband's damages are to be "measured by the value of her services as a wife or companion; . . . that the pecuniary loss was to be measured by the nature of the service, characterized as it was by the relation in which the parties stood to each other. Certainly, the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife and the mother of children surely make her services greater than those of an ordinary servant, and, therefore, worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value." The comfort, society, and protection of a husband are no more fanciful or speculative than the frugality, industry, usefulness, attention, and tender solicitude of a wife, and the one can be compensated by that simple standard of pecuniary loss, by which the damages of the rich and the poor, the refined and cultivated, and those less so, are

measured as the other. The right of a husband to recover damages for being deprived of the society of his wife by reason of injuries inflicted by the negligence of another has been often recognized at common law, though not in cases involving death; and it has never been considered that the damages on this account were either speculative, fanciful, or liable to bankrupt a defendant: *Jones v. Utica etc. R. R. Co.*, 40 Hun, 349; *Ainley v. Manhattan Ry. Co.*, 47 Hun, 206; *Blair v. Chicago etc. R. R. Co.*, 89 Mo. 334, 1 S. W. 367; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800, 15 S. W. 315. In the following cases loss of society has been held a proper element for consideration ⁷⁴ in estimating damage under various statutes in this class of cases, some of them confining such element to actions by a husband or widow: *Richmond etc. R. R. Co. v. Freeman*, 97 Ala. 289, 11 South. 800; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, 7 S. E. 515; *Baltimore etc. R. R. Co. v. State*, 24 Md. 271; *Webb v. Denver etc. Ry. Co.*, 7 Utah, 17, 24 Pac. 616; *Baltimore etc. R. R. Co. v. Noell*, 32 Gratt. 394; *Simmons v. McConnell*, 86 Va. 494, 10 S. E. 838; *Wells v. Denver etc. Ry. Co.*, 7 Utah, 482, 27 Pac. 688; *Hyde v. Union Pac. Ry. Co.*, 7 Utah, 356, 26 Pac. 979. The case of *Webb v. Denver etc. Ry. Co.*, 7 Utah, 17, 24 Pac. 616, has been cited to sustain the proposition that loss of society is not an element of damage in this class of cases. That case holds that a mother is entitled to recover only her pecuniary loss, and not for mental pain and suffering caused by the death of a child, in an action for damages under a statute somewhat similar to Lord Campbell's act, but it is there admitted that the word "pecuniary," in this connection, "is not construed in any very strict sense, and the tendency is to still greater liability and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother only can give to children; . . . the loss of the society of a near relative." The same court has held that while nothing is to be allowed for mental suffering or as a solace for feelings, ⁷⁵ the jury may allow damages to a widow and daughter for being deprived of the support, care, nurture, companionship, assistance, and protection of the deceased (*Wells v. Denver etc.*

Ry. Co., 7 Utah, 482, 27 Pac. 688), and, in an action by parents, that the jury may take into consideration the loss to the parents of the society of their child: *Hyde v. Union Pac. Ry. Co.*, 7 Utah, 356, 26 Pac. 979. Under our statute we hold that in estimating the pecuniary loss sustained by a widow in consequence of the death of her husband, the jury may properly take into consideration the loss of the comfort, protection and society of the husband in the light of all the evidence in the case relating to the character, habits and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death. The sixth instruction on behalf of the plaintiff was properly given, and the court correctly refused the fourteenth instruction requested by defendant because it excluded the elements of "comfort, protection, and society" from the consideration of the jury.

(2.) The second instruction by the court of its own motion, as well as the fourteenth instruction requested by defendant, in that they each authorized the jury to give plaintiff as damages the full sum of the probable future earnings of the deceased, taking into consideration his age, health, business capacity, habits, experience, and the value of his services in the care of his family, were erroneous. The widow is not entitled to the gross sum of her husband's future earnings. The deceased would necessarily have consumed at least a portion of those earnings for his own individual benefit had he lived.

It is a difficult matter to lay down general rules by ⁷⁶ which to estimate damages in this class of cases. Those which occur to us as being applicable to this case, so far as we can judge from the evidence in the record, are as follows: In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any, but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he

would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death. All these elements to be based upon the probable joint lives of herself and husband. She is also entitled to compensation for loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages: Tiffany on Death by Wrongful Act, 77 secs. 158, 159, 166; 3 Wood on Railroads, sec. 414; 2 Sedgwick on Damages, sec. 573 et seq. Within these limits the jury exercise a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information: Tiffany on Death by Wrongful Act, sec. 177; Kansas Pacific Ry. Co. v. Miller, 2 Colo. 442; Chicago v. Scholten, 75 Ill. 468.

In view of other instructions to the jury, to the effect that they should not give damages for the pain and suffering of the deceased, nor for the grief and wounded feelings of the surviving relatives, we discover no error in the seventh and tenth instructions given on behalf of plaintiff, except that they do not clearly embrace the idea that the jury in estimating damages must be governed by, and not go outside of, the evidence and the knowledge and experience possessed by all persons in relation to matters of common knowledge and observation. Upon another trial they should be amended in this respect.

The ninth instruction for plaintiff was erroneous, because it authorized the jury to give as damages the value of the life of the deceased, and gave them too much discretion in estimating the damages: Duval v. Hunt, 34 Fla. 85, 15 South. 876. Her recovery is not the value of the deceased's life generally, but the value of that life to her, or the loss sustained by her from the premature death of the deceased, as shown by the proofs.

The judgment is reversed and a new trial granted.

STATUTES.—WHEN A REPEALING ACT RE-ENACTS substantially the provisions of the act repealed, the latter act is not thereby destroyed or interrupted in its operation: Forbes v. Board of Health, 27 Fla. 189, 26 Am. St. Rep. 63, 9 South. 446.

INSTRUCTIONS WHICH ASSUME A FACT about which there is a controversy are properly refused: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692. A charge which assumes a fact not proved is erroneous: *Gulf etc. Ry. Co. v. Brentford*, 79 Tex. 619, 23 Am. St. Rep. 377, 15 S. W. 561; *Birmingham etc. Electric Co. v. City Stable Co.*, 119 Ala. 615, 72 Am. St. Rep. 955, 24 South. 558. A request to charge, which assumes the very point in controversy, should be refused: *Schmidt v. McGill*, 120 Pa. St. 405, 6 Am. St. Rep. 713, 14 Atl. 383.

RAILROADS—BACKING TRAINS IN TOWN OR VILLAGE—NEGLIGENCE.—A railroad company is bound to exercise more caution and a higher degree of care when running its cars through a village or city than in the open country: *Beisiegel v. New York Cent. R. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741. While operating its trains therein it must use a degree of caution corresponding to the danger: *Gulf etc. Ry. Co. v. Walker*, 70 Tex. 126, 8 Am. St. Rep. 582, 7 S. W. 831. Especial care must be observed where cars are to be “kicked” or sent on a flying or running switch over a crossing: *Note to Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 66. See, also, *Cooper v. Lake Shore etc. Ry. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482, 33 N. W. 306. That a “flying” switch is negligent, see note to *Ormsbee v. Boston etc. R. R. Corp.*, 51 Am. Rep. 360; especially where it is on a public highway which is constantly in use, the car not being under the control of a brakeman: *O'Connor v. Missouri Pac. Ry. Co.*, 94 Mo. 150, 4 Am. St. Rep. 364, 7 S. W. 106. A railroad company must exercise the utmost care and diligence to avoid running over a person on its track: *East Tennessee etc. R. R. Co. v. St. John*, 5 Sneed, 524, 73 Am. Dec. 149. Travelers on city streets using tracks of railroad operating therein are not trespassers: *Cline v. Crescent City etc. R. R. Co.*, 43 La. Ann. 327, 26 Am. St. Rep. 187, 9 South. 122; *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196, 3 Am. St. Rep. 638, 15 N. E. 234; nor is it negligence for a person to cross such tracks, wherever he may have occasion to do so: *Birmingham etc. Electric Co. v. City Stable Co.*, 119 Ala. 615, 72 Am. St. Rep. 955, 24 South. 558.

RAILROADS—DUTY AS TO GIVING SIGNALS.—Notice of the approach of railway trains should be given by those in charge of them, at all points of known or apprehended danger: *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181. Compliance with statutory regulations does not necessarily relieve the railroad company from the necessity of taking such additional precautions as are essential to the safety of passers on the highway: *Note to Baltimore etc. R. R. Co. v. Breinig*, 90 Am. Dec. 63. It will not relieve the company from a charge of negligence in failing to adopt such other reasonable measures for public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case: *English v. Southern Pac. Co.*, 13 Utah, 407, 57 Am. St. Rep. 772, 45 Pac. 47. See, also, *Houston etc. Cent. Ry. Co. v. Boozer*, 70 Tex. 530, 8 Am. St. Rep. 615, 8 S. W. 119.

CONTRIBUTORY NEGLIGENCE—WHEN NO BAR TO A RECOVERY.—That an injured party may recover, though guilty of contributory negligence, if the defendant could, by the exercise of ordinary care, have avoided the consequences of the negligence of the plaintiff, see cases cited in the notes to *Valin v. Milwaukee etc. R. R. Co.*, 33 Am. St. Rep. 28; *Daniel v. Chesapeake etc. Ry. Co.*, 32 Am. St. Rep. 893; *Troy v. Cape Fear etc. R. R. Co.*, 99 N. C. 298, 6 Am. St. Rep. 521, 6 S. E. 77.

NEGLIGENCE—DAMAGES FOR WRONGFUL DEATH.—In an action by a widow to recover for the death of her husband caused by the wrongful act or neglect of another, the jury, in estimating the damages, is confined to the pecuniary loss sustained by the plaintiff: *English v. Southern Pac. Co.*, 13 Utah, 407, 57 Am. St. Rep. 772, 45 Pac. 47. In fixing this amount consideration should be given to the age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures: *McHugh v. Schlosser*, 159 Pa. St. 480, 39 Am. St. Rep. 699, 28 Atl. 291. The standard for the measurement of damages is the pecuniary value of the life of the person killed to the beneficiaries: *Missouri Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837. See, also, *Alabama etc. R. R. Co. v. Jones*, 114 Ala. 519, 62 Am. St. Rep. 121, 21 South. 507. The plaintiff cannot recover for her mental suffering, nor is the jury authorized to give damages by way of a solatium: See monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375, on the elements and measure of damages in actions for having caused the death of human beings, showing when loss of society is an element of damage in this class of cases.

DELL v. MARVIN.

[41 Fla. 221, 26 South. 188.]

APPEAL—REVIEW OF ERRORS—LIMITATION UPON.—An appellate court will consider only those errors which have been assigned by the plaintiff in error.

MECHANIC'S LIEN—ATTORNEY'S FEE—ALLOWANCE OF.—An attorney's fee allowed by statute for the successful establishment and enforcement of a mechanic's lien is incidental to the lien claim, and is entitled to payment on the same basis as the judgment for labor or material furnished.

CONSTITUTIONAL LAW—ATTORNEY'S FEE—ALLOWANCE OF.—A STATUTE which allows an attorney's fee to the plaintiff, in enforcing a mechanic's lien, when he recovers judgment, does not contravene any provision of the state or federal constitution.

A. W. Cockrell & Son, for the plaintiff.

John E. Hartridge and R. H. Liggett, for the defendants in error.

222 MABRY, J. A statement of facts in this case, so far as was necessary on the application then before the court, will be found in *Dell v. Marvin*, 31 Fla. 152, 12 South. 216. It appears from the record that the sheriff of Duval county filed a motion in the circuit court, entitled in the causes of *A. G. Elliott & Co. v. The Standard Publishing Company*, and *I. N. Megargee & Co.* against the same defendant, and therein stated that in the said entitled causes and thirty-two others in which

judgments had been obtained and executions issued, funds specified were in his hands, realized from the sale of property of the defendant, the Standard Publishing Company, but wholly insufficient to satisfy the said several execution creditors, and a contest had arisen and doubts existed as to the proper application of said funds among the said several creditors, and asking the direction and protection ²²³ of the court as to the application of the funds. With the motion a list of thirty-five creditors was filed, and it was prayed that they be made parties by appropriate process and required to interplead among themselves and be concluded by the judgment of the court. All the creditors appearing by their respective attorneys, an order was made by the circuit judge that the several creditors file in writing, within a time stated, their respective claims to the funds in the hands of the sheriff, and the grounds upon which they claimed priority of lien. The order also directed that each creditor might take issue upon or contest the claim of another creditor. Plaintiff in error as assignee filed a statement of claim of twenty-seven judgments obtained by different parties before the county judge of the county, and two obtained in the circuit court, and executions thereon against the Standard Publishing Company. J. L. Marvin, trustee, filed a statement of claim of the judgment and execution of Megargree & Co., and a mortgage given by the Standard Publishing Company to him as trustee. A. G. Elliott & Co. filed a statement of claim of two circuit court judgments and executions issued thereon. The Citizens' Gas and Electric Company filed a statement of claim of a judgment, and Elizabeth S. Robinson filed a statement of claim for rent alleged to be due from the Standard Publishing Company.

The amounts of the various claims propounded, including the dates and amounts of judgments, together with costs and attorney's fee of twenty-five dollars allowed in each case, were shown. The grounds of priority of payment out of the funds were set out in the written statements of demands, and there were contests among the various creditors as to the validity of each other's claims, including the constitutionality of the law under which attorneys' fees were allowed in the judgments ²²⁴ held by plaintiff in error. The final judgment on the motion recites: "Said motion coming on to be again heard, came the several parties interested herein, intervening under the order of this court, and the said defendants, by their several attorneys, and was submitted to the court, upon said several interventions, the

objections and exceptions severally thereto, and the issues severally joined thereon, upon the records and proceedings of record and file in this court, and in the court of the county judge of said Duval county, in which the said several records and proceedings were respectively had, and upon the testimony of witnesses, and documentary evidence produced in open court, and was argued at length by the respective counsel," and thereupon it was ordered that so much, stating the amount, of each of the twenty-nine judgments held by plaintiff in error as was recovered for services rendered by the plaintiff therein prior to February 16, 1892, as employes of the Standard Publishing Company, was a prior lien on the funds, as was also the costs, except twenty-five dollars taxed in each case as attorney's fee under section 20 of chapter 3747 of the act of 1887, which section was, in so far as it allows such fees, declared to be unconstitutional and void; that the Megargree & Co. judgment held by J. L. Marvin, trustee, was entitled to be first paid out of the remaining funds, and the Elliott & Co. and the Citizens' Gas and Electric Company judgments be paid, share and share alike, out of the residue, and as this exhausted the funds held by the sheriff, the claims of the remaining intervenors were denied and disallowed.

Dell alone sued out a writ of error, and assigns as error the ruling of the court declaring so much of section 20 of chapter 3747 of the act of 1887, providing for attorneys' fees, to be unconstitutional, and directing that no part ²²⁵ of the funds in the hands of the sheriff be applied in payment of such fees.

The case is presented on the record without a bill of exceptions, and no objection is anywhere made to the procedure in the circuit court in settling the conflicting claims of the various creditors to the funds in the hands of the sheriff.

It sufficiently appears from the record that plaintiff in error was holder of judgments obtained under chapter 3747 of the act of 1887, being "An act to protect mechanics, artisans, laborers, and materialmen, and to provide for the speedy collection of moneys due them for wages or materials furnished," and the order of the court is that so much of each judgment, stating definitely the amount of each, for services rendered by the plaintiffs named therein as employes of the Standard Publishing Company previous to a given date, including costs of suit, but not the attorney fee taxed therein, was a prior lien on the funds in the hands of the sheriff, and should be first paid. The attorney fee feature of each judgment was denied partici-

pation in the funds on the sole ground that the provision of the act allowing it was unconstitutional. The view of reasonableness of the fee did not enter into the decision, nor has contention been made that the amounts in the judgments were unreasonable.

In brief of counsel filed on behalf of Marvin, one of the defendants in error, it is insisted that the court erred in allowing any part of the judgments held by plaintiff in error to share in the funds, but this contention cannot be entertained by us. Marvin has not sued out any writ of error from the judgment rendered, and the only question open for consideration arises on the error assigned by plaintiff in error, which is the constitutionality ²²⁶ of the provision in the act providing for attorneys' fees.

The act under which the judgments held by plaintiff in error were rendered created a lien in favor of mechanics, material-men, and various classes of laborers for work and labor done and material furnished, and the procedure for enforcing the lien is provided.

By section 20 it is enacted "that if upon trial of the case it shall be found in favor of the plaintiff, then judgment shall be rendered in his favor for the amount as returned by the jury, together with the costs of the court, and an attorney's fee of not less than ten dollars (\$10) if the suit is tried before a justice of the peace, and not less than twenty-five dollars (\$25) if it be tried before the county judge, the judge of the county, or circuit court." The attorney's fee provided is for the successful establishment and enforcement of the lien given, and is incidental thereto. If such fees cannot be considered as part of the court costs, they must be regarded as incidents to the enforcement of the lien, and, in our judgment, if the provision for them be valid, they are entitled to payment on the same basis as the judgment for labor or material furnished: *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15. The act of 1887 was passed soon after the constitution of 1885 went into effect, and this instrument declares, in section 22 of article 16, that "the legislature shall provide for giving to mechanics and laborers an adequate lien on the subject matter of their labor." This provision removes all objection to the act in question on the ground that it is class legislation, as there is an express command to legislate, to the extent of providing an adequate lien in favor of the class mentioned. We have heretofore regarded the act as not being special in the sense of vio-

lating constitutional restrictions, as it affects alike all ²²⁷ persons similarly situated: *Summerlin v. Thompson*, 31 Fla. 369, 12 South. 667.

We are unable to perceive that the provision allowing attorneys' fees to plaintiff in enforcing mechanics' liens is violative of any part of our constitution; and if investigation ended here the act must be sustained. It is further insisted that the provision allowing attorneys' fees is in conflict with the latter clause of section 1 of article 14 of the federal constitution, prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws." The decisions in the state courts are conflicting on the direct question presented under our statute. In Michigan and Alabama the rulings are adverse to the constitutionality of such legislative provisions: *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006; *Randolph v. Builders' etc. Supply Co.*, 106 Ala. 501, 17 South. 721. The Michigan court denied the right of the legislature to impose an attorney's fee in favor of plaintiffs recovering for stock killed on a railroad in consequence of a failure to fence in obedience to statutory requirement. We do not follow this ruling, and as we understand the decisions of the supreme court of the United States, that court does not sanction such a ruling: *Jacksonville etc. Ry. Co. v. Prior*, 34 Fla. 271, 15 South. 760. In Ohio a statute was declared void that gave to plaintiffs attorneys' fees in suits for labor, without any reference to a lien: *Coal Co. v. Rosser*, 53 Ohio St. 12, 53 Am. St. Rep. 622, 43 N. E. 263. The validity of statutes involving the question now raised under ours is fully sustained in decisions in Montana, Washington, and Illinois: *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386. Statutes providing for ²²⁸ the taxing of attorneys' fees in favor of plaintiffs when successful in various cases, other than for enforcing liens in favor of mechanics, have been sustained. Such as in actions upon policies of insurance, in suits against railroads to recover damages for violation of statutory duties, for injuries caused by fire communicated from engines, and in certain actions of ejectment for land taken by railroads and not condemned under statutes of eminent domain: *Union Cent. Life Ins. Co. v. Chowning*, 86 Tex. 654, 26 S. W. 982; *Insurance Co. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 48 N. W. 98; *Atchinson etc. R. R. Co. v. Matthews*, 58 Kan. 447, 49 Pac. 602; *Cameron v. Chicago*

etc. Ry. Co., 63 Minn. 384, 65 N. W. 652; Perkins v. St. Louis etc. Ry. Co., 103 Mo. 52, 15 S. W. 320. It is the plain duty of the court to sustain an act of legislation unless clearly in violation of some express or implied limitation in the constitution. On the direct point we are considering no decision of the supreme court of the United States has been made, so far as we have been able to find. In Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255, the supreme court held (reversing the state court, 87 Tex. 19, 26 S. W. 985) that a statute allowing attorneys' fees to plaintiffs in suits not exceeding fifty dollars against railroad corporations only was repugnant to the fourteenth amendment to the constitution of the United States. The court holds that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause in the fourteenth amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—²²⁹ something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. In the opinion in this case it is stated that statutes giving attorney fees to mechanics and laborers in enforcing liens for their labor had been sustained, and we discover nothing in the reasoning of the court to condemn such state legislation. The class of laborers provided for in the statute was singled out by the framers of our organic law and legislation for their special benefit was commanded. If there exists some just basis, some real public policy, or just need for the classification and distinction made in favor of the class of persons mentioned, or, in the language of the supreme court, if there is "some difference which bears a just and proper relation to the attempted classification," the act should be sustained. We are of opinion that the act can be sustained on the grounds stated, and, therefore, hold that the court erred in declaring the act unconstitutional and void.

The judgment of the court below is reversed.

TAYLOR, C. J., DISSENTED. He considered that the allowance of a distinctive attorney's fee in the event of the mechanic succeeding in the suit left his opponent with the unequal burden of paying his own attorney's fee in case the mechanic should fail in his suit. "Our constitution," he said, "expressly enjoins upon the legislative department the duty to provide an adequate lien to secure the wages of mechanics, but it nowhere requires that the judicial means to be provided for the enforcement of such liens shall give to the lienors an unequal advantage before the law, nor is such discrimination at all necessary to a perfect compliance with the con-

stitutional requirement to give them an adequate lien on the subject matter of their labor.

"My view is," he said, "that the assertion in our own constitutional declaration of rights, to the effect that 'all men are equal before the law,' and the inhibition of article 14 of the federal constitution against the denial by the states to any person of the equal protection of the laws, plainly forbid any such discrimination between suitors or classes of suitors before the courts. To my mind, the clear intent and purpose of both of these provisions is, that no individual, or class of individuals, shall be given any undue advantage over any other individual or class of individuals, either in the substance of the law itself, nor in the judicial procedure provided for the enforcement of such law. In other words, all men shall be equal, not only in and by the law as enacted by the legislature, but before the courts and in the procedure provided for the execution and enforcement of such law. Any law that says, in effect, to one suitor or class of suitors you shall have from your adversary in case of recovery your just claim and all court costs, and, besides, your attorney's fee, but your adversary, though he shall prove successful and though he may establish the fact that your claim was fraudulent and unreal, and conceived in malice for the avowed purpose of subjecting him to the expense of employing skilled professional assistance to defend against and expose the fraud, shall recover nothing but his bare court costs, and nothing to remunerate him for the expense you have designedly forced him to incur, seems to me to be as flagrant an infraction of these constitutional inhibitions as can well be conceived.

"But this statute goes further. It fixes an arbitrary minimum sum that shall be awarded to the mechanical suitor for his attorney fee; and, in effect, says that no smaller sum than that prescribed shall be awarded for such fee, regardless of the amount at which the favored suitor can and does in fact secure the services of the attorney employed. It says, in effect, to the favored suitor, 'When your litigation is in the circuit court, although your actual recovery therein may be barely nominal, you shall be awarded an attorney's fee of not less than twenty-five dollars, even though you may have actually secured such attorney's services at the agreed price of ten dollars. In such a case the overplus of fifteen dollars out of the prescribed award for attorneys' fees is forced from the nonmechanical suitor, under the guise of attorneys' fees, but in reality goes into the pockets of the favored litigant, operating simply as a legal penalty levied upon the nonfavored suitor as punishment for his tardiness in discharging this highly favored class of obligation. A law that makes such a state of affairs possible metes out but partial justice, and puts the citizen upon grossly unequal ground before the law, overflowing the cup of its protection to the one, and but half filling it as to the other.'"

Constitutionality of Statutes Allowing an Attorney's Fee.*

This is a question upon which there is a decided conflict of opinion, and this difference of opinion seems to arise, not from a different understanding of the principles of constitutional law governing the matter, but from varying views as to how those principles shall be applied under various circumstances. There could be no valid objection to a statute giving an attorney's fee to all successful litigants; and where the act complained of is not a tort and has not been made unlawful by statute, and where the defendant has been guilty of no wrong further than that implied in not paying without suit the sum which, after suit, is adjudged to be due from him, whether his liability is founded upon contract or not, it is equally clear that he cannot be subjected to a penalty in the nature of liability for the attorney's fee of his adversary, unless all other persons in the same class, natural and artificial, are also liable to such attorney's fee, if judgment is recovered against them upon a demand of like character: *Note to St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 173. But a statute may authorize the award of such a fee to some litigants and withhold it from others, when justified by special circumstances, as where some wrongful or negligent conduct is imputed to the defeated party, or where there is a well-defined class of cases and persons which may properly serve as a basis for valid legislative action: See *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386; *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98, and cases cited near the end of this note.

A statute which allows an attorney's fee to the appellee where the judgment is affirmed on an appeal in any action for damages brought by a citizen of the state against any corporation, undoubtedly discriminates between classes of persons as to the incidents of an appeal from the judgment of an inferior court, for the act applies, not in all actions for damages between corporations and citizens, but only when a citizen is the plaintiff; and the act is, therefore, unconstitutional because of its discriminating character: *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 641. In this case, Campbell, C. J., said: "To say that where certain persons are plaintiffs, and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally is to deny the equal protection of the law to the party thus discriminated against." He also showed that if a corporation sues a citizen for damages, is cast in the action, appeals and fails, no fee is taxed against it in favor of the citizen, for it is only when the citizen brings the action that such a result follows an unsuccessful appeal. "It is doubtless true," said he, "that the act was designed for the relief of citizens who become litigants in actions against corporations, because it applies only when a citizen is plaintiff, and it was assumed that the corporation would be appellant, and to avoid dis-

*REFERENCE TO MONOGRAPHIC NOTES.

Of the protection of corporations from special and hostile legislation: 62 Am. St. Rep. 165-182.

crimination between parties to the same action, it was made to operate on either party as appellant, but it sometimes occurs, and may very often, that the citizen plaintiff is an appellant, and in such cases the discrimination may operate oppressively on him. The act was intended to deter from the appellate courts corporations against whom judgments should be rendered for damages, or citizens of this state suing them for damages. It was conceived in hostility to citizens as plaintiffs or corporations as defendants in such actions. In either view, it is partial and discriminating against classes of litigants": *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 647, 649-651.

A statute allowing as part of the cost an attorney's fee in favor of the plaintiff, in a suit to recover for personal services, was pronounced unconstitutional in *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 111, 43 N. W. 1002, and a statute undertaking to compel an unsuccessful litigant to pay the attorney's fee of his opponent, where the former has not been guilty of any wrongful or negligent act, is declared to be unconstitutional: *Coal Co. v. Rosser*, 53 Ohio St. 12, 53 Am. St. Rep. 622, 41 N. E. 263. In this case, a statute giving the plaintiff in every action for wages in which he shall recover the sum named in his complaint, or bill of particulars, such costs as the court may allow, not exceeding five dollars, for his attorney's fee, if, before bringing such action, he has made a written demand for the sum due him, was declared to be in conflict with that provision of the state constitution which affirms the right to possess and protect property, and which declares that government is instituted for the equal benefit and protection of all persons: *Coal Co. v. Rosser*, 53 Ohio St. 12, 53 Am. St. Rep. 622, 41 N. E. 263. But in Illinois a statute allowing the plaintiff, in a suit for wages, to recover a reasonable attorney's fee in addition to his claim is considered not to be objectionable as special or class legislation, for all persons who bring such actions fall within its provisions: *Vogel v. Pekoc*, 157 Ill. 339, 345, 42 N. E. 386. "It embraces," said the court, "a well-defined class of cases and persons, not singled out, as is contended, wholly without reason, and arbitrarily, but upon grounds which may, we think, properly serve as a basis for valid legislative action": *Vogel v. Pekoc*, 157 Ill. 339, 345, 42 N. E. 386.

A statute allowing an attorney's fee to be charged as costs in a suit for "back taxes" is not unconstitutional: *State v. Kerr*, 8 Mo. App. 125. A statute is not unconstitutional because it compels a party who is delinquent in the payment of taxes, if sued, to pay costs and a percentage, by way of an attorney's fee, in addition to the tax assessed: *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521. An act authorizing five per cent damages to be taxed as costs against the losing party in litigated cases in San Francisco operates equally and uniformly upon all parties upon whom it operates at all, and is constitutional: *Corwin v. Ward*, 35 Cal. 195, 95 Am. Dec. 93. A statute allowing a fee to the attorney who appears for the commonwealth when a fine is imposed under the act is constitutional: *Commonwealth v. Munn*, 14 Gray, 361. And a statute allowing the

state's attorney, a fee, by way of costs, in addition to the costs usually taxed, when an unsuccessful attempt is made to resist and defeat the collection of a just debt due the state, is not unconstitutional: *United States etc. Light Co. v. State*, 79 Md. 63, 72, 28 Atl. 768.

A statute making a life insurance company answerable for an attorney's fee, in an action brought against it to collect a loss which it has failed to pay within the time specified in the policy, is not unconstitutional, but is a valid law: *Union Cent. Ins. Co. v. Downing*, 86 Tex. 654, 26 S. W. 982, 8 Tex. Civ. App. 455, 28 S. W. 117, *Washington Life Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490, 49 S. W. 123; *Mutual Life Ins. Co. v. Blodgett*, 8 Tex. Civ. App. 45, 28 S. W. 141. The Kansas statute allowing an attorney's fee to the plaintiff in suits upon fire insurance policies is constitutional: *British-America Assur. Co. v. Bradford*, 60 Kan. 82, 55 Pac. 335; *Shawnee Fire Ins. Co. v. Bayha* (Kan. App., Dec. 1898), 55 Pac. 474; and the statute of Nebraska, authorizing a court, upon rendering judgment against an insurance company on a policy of insurance on real property, to allow the plaintiff in the action a reasonable sum as an attorney's fee, to be taxed as part of the costs in the case, is constitutional: *Insurance Co. v. Bachler*, 44 Neb. 549, 62 N. W. 911.

The constitutionality of statutes allowing plaintiff who forecloses a mechanic's lien to have an attorney's fee taxed as costs, has been denied in a few cases. Thus, the Colorado act, allowing the plaintiff, in all suits for the foreclosure of mechanics' liens and in which he shall obtain a judgment and decree for foreclosure, to have taxed as costs, in addition to other costs, an attorney's fee to be fixed by the court, is considered to be fundamentally bad, and in violation of the bill of rights, which declares that courts of justice shall be open to every person, and that right and justice shall be administered without sale, denial, or delay: *Davidson v. Jennings* (Colo., Feb. 5, 1900), 60 Pac. 354. It is also considered to be in contravention of the federal constitution, "for there is no reason apparent to the average intelligence which ought to give a man who undertakes to build a house any other or greater rights in the collection of his debt and the enforcement of his claim than to any other tradesman who furnishes supplies to the individual or to the family": *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 1, 5, 56 Pac. 246. The statute of Alabama, allowing a lien for an attorney's fee in mechanic's lien cases has also been held unconstitutional on the ground that it violates equality and uniformity of rights and privileges, to which all persons are entitled: *Randolph v. Builders' etc. Supply Co.*, 106 Ala. 501, 17 South. 721; and the supreme court of Michigan, in a log-lien suit brought to recover for personal services, has declared that a statute providing for the taxation of an attorney's fee as a part of the plaintiff's costs is unconstitutional, on the ground that all persons are not protected in their equal rights before the law, which must be administered be-

tween them as suitors: *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 43 N. W. 1006. The weight of authority, however, supports the contention that a statute providing for a reasonable attorney's fee in a suit to foreclose a mechanic's lien, where judgment is rendered for the plaintiff, is not unconstitutional as granting unequal privileges to litigants and denying equal protection of the laws, since such a provision is in the nature of costs to be determined by the court: *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Helena etc. Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 471. And the lien laws of Montana and Washington do not restrict the recovery of an attorney's fee to mechanic's lien cases, but permit the allowance of an attorney's fee for the enforcement of other liens upon property, and such laws are considered to be constitutional: *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Helena etc. Supply Co. v. Wells*, 16 Mont. 65, 40 Pac. 78; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 471. Thus, the statute of Washington authorizing the court to allow a reasonable attorney's fee, upon foreclosure, for each person claiming a logger's lien, is held not to be unconstitutional, in any sense, but permissible upon the same theory that costs are allowed: *Ivall v. Willis*, 17 Wash. 645, 648, 50 Pac. 467. "It is in no sense a penalty inflicted upon the defendant": *Ivall v. Willis*, 17 Wash. 645, 648, 50 Pac. 467. Even if the attorney's fee, in mechanic's lien cases, is not, strictly speaking, a part of the costs, it may properly be allowed for the same reason that costs are allowed, namely, that it is a necessary incident of the judgment: *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15.

There is also a marked conflict of opinion respecting the constitutionality of statutes allowing an attorney's fee as a part of the costs, in actions against railroad companies, in case of recovery for the killing of stock on their tracks. In Michigan, an allowance to the plaintiff of a fee of twenty-five dollars in such a case is held to be unconstitutional: *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382, 38 N. W. 289; *Schut v. Chicago etc. Ry. Co.*, 70 Mich. 433, 38 N. W. 291; *Rinear v. Grand Rapids etc. R. R. Co.*, 70 Mich. 620, 623, 38 N. W. 599; *Lafferty v. Chicago etc. Ry. Co.*, 71 Mich. 35, 37, 38 N. W. 660. In discussing *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382, 384, 38 N. W. 289, the court said: "The imposing of the attorney's fee of twenty-five dollars as costs cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes

the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of twenty-five dollars, if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of ten dollars in justice's court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the ten dollars and an additional penalty of twenty-five dollars; for it is nothing more or less than a penalty. Calling it an 'attorney fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist": *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382, 384, 38 N. W. 289.

Other cases have not gone to such an extreme length as the court of Michigan, but hold that no penalty for the violation of a law can be sustained where no law has been violated. Thus, a statute which imposes upon a railroad an absolute liability for damages for all stock injured or killed, and which authorizes a recovery of double the appraised value of the animals, with a reasonable attorney's fee in case of failure to pay the appraised value within the time prescribed is unconstitutional, for there is a marked distinction between such a statute and one imposing a liability as a penalty for the violation of a law: *Denver etc. Ry. Co. v. Outcalt*, 2 Colo. App. 395, 405, 31 Pac. 177. So with a statute which fixes an absolute responsibility upon the railroad company, where the act requires notice of the injury or killing of the stock to be given, and the company fails to give such notice. It is unconstitutional, including that part which provides for a reasonable attorney's fee. A statute granting to a certain class of litigants the right to recover an attorney's fee as part of their costs of suit is held to be unconstitutional, as class legislation, unless the right to recover such fee is restricted to cases in which the unsuccessful litigant has been wrongfully acting, and the attorney's fee may be regarded as a penalty imposed upon him therefor: *Jolliffe v. Brown*, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 144. In these stock-killing cases it has also been held that the legislature has no power to substitute boards of arbitration, for the courts, without the consent of the parties, to assess damages, nor to tax an attorney's fee by way of imposing a penalty for refusing to abide by the assessments or awards of such boards: *St. Louis etc. Ry. v. Williams*, 49 Ark. 492, 5 S. W. 883. The Alabama statute on the subject has

been held unconstitutional because it attempts to impose upon railroad corporations an absolute liability for stock killed or injured, without any inquiry into the question of negligence or other fault, and that part of the act which requires a reasonable attorney's fee, not exceeding twenty dollars, to be assessed by the court, as part of the costs, against every unsuccessful appellant in such actions is pronounced unconstitutional on the ground that it violates equality and uniformity of rights and privileges, secured by the fundamental principles of the state and federal constitution, and creates unequal and unjust discrimination against a particular class of litigants: *South etc. R. R. Co. v. Morris*, 65 Ala. 193, 199.

The most conspicuous case of the unconstitutionality of such legislation is that of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, reversing the same case, 87 Tex. 19, 26 S. W. 985. The statute of Texas provided, in substance, that, if any person had a valid bona fide claim, not exceeding fifty dollars, against a railroad corporation, for personal services or damages, or for overcharges on freight, or for the destruction or injury of stock by its trains, and presented the claim, verified by the affidavit, to the corporation, he might sue thereon if it was not paid within thirty days, and that if he should obtain judgment, he should be entitled to recover all costs of suit and all reasonable attorneys' fees, provided he had an attorney employed in his case, not to exceed ten dollars, to be assessed and awarded by the court or jury trying the issue. The state court held this statute to be constitutional, but the federal court pronounced it unconstitutional on the ground that its effect was to deprive railroad companies of property without due process of law, and denied to them the equal protection of the law, in that it singled them out of all citizens and corporations, and required them to pay, in certain cases, an attorney's fee to the parties successfully suing them, while it gave to them no like or corresponding benefit: *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 153, 17 Sup. Ct. Rep. 255. It is apparent, said the court, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained. In delivering the opinion of the court, Mr. Justice Brewer said: "The supreme court of the state considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes

no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees, if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute. It is true the amount of the attorney's fee which may be charged is small, but if the state has the power to thus mulct them in a small amount, it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved": *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150, 153, 17 Sup. Ct. Rep. 255. For other extracts from this case, see the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 173-175, on the protection of corporations from special and hostile legislation, and wherein is discussed, to some extent, the question of imposing liability for an attorney's fee.

Notwithstanding the above imposing array of authorities against the constitutionality of statutes allowing an attorney's fee in cases against railway companies, there are circumstances under which the allowance of such a fee is clearly and undeniably constitutional. All statutes providing for the recovery of damages against railway companies for injuries to livestock should not be treated as mere schemes for the speedy collection of damages for such injuries, although that is incidentally provided for. There is a higher view to be taken of such statutes, namely, the prevention of accidents on railroads, and such precautions are clearly a proper and legitimate exercise of the police power of the state, as such power may well be exercised for the prevention of calamities as well as for the prevention of crimes. The legislature, therefore, has authority, under its general police power, to require railroads to fence their tracks, and to make them liable for the value of all stock killed by their trains in consequence of a failure to so fence: See note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 170. It also has power to allow a reasonable attorney's fee to the plaintiff, in case of a recovery, for the prosecution of suits against railroad companies for the value of stock killed or injured by reason of their failure to fence. The result of such views is that a statute making railways liable for stock killed by reason of neglect to fence their tracks, and for an attorney's fee in addition, is not unconstitutional,

for the imposition of the attorney's fee, in such cases, is in the nature of a penalty for the failure or neglect of the railroad company: *Peoria etc. Ry. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Railroad v. Crider*, 91 Tenn. 489, 19 S. W. 618; *Kansas Pac. Ry. Co. v. Mower*, 16 Kan. 573; *Perkins v. St. Louis etc. Ry. Co.*, 103 Mo. 52, 15 S. W. 320; *Jacksonville etc. Ry. Co. v. Prior*, 34 Fla. 271, 15 South. 760; *Briggs v. St. Louis etc. Ry. Co.*, 111 Mo. 168, 20 S. W. 32.

The allowance of an attorney's fee in such cases is not unconstitutional as vicious "class legislation," although the statute confers benefits upon a limited class, namely, the owners of livestock, and imposes burdens upon a limited class, namely, unfenced railroads, for these classes are not arbitrary, but natural: *Railroad v. Crider*, 91 Tenn. 489, 495, 19 S. W. 618; *Perkins v. St. Louis etc. Ry. Co.*, 103 Mo. 52, 15 S. W. 320. Upon the same principles a statute authorizing the allowance of an attorney's fee in actions against railroad companies to recover damages caused by fire in the operation of their roads, is constitutional: *Atchison etc. R. R. Co. v. Matthews*, 58 Kan. 447, 450, 49 Pac. 602; *Chicago etc. Ry. Co. v. Spring Hill etc. Assn.* (Kan. App., May, 1899), 57 Pac. 252. Compare the note to *St. Louis etc. Ry. Co. v. St. Paul*, 62 Am. St. Rep. 171, as to liability for injuries caused by fire. If a statutory rule has been violated, a penalty for its violation may be imposed, and may consist of subjecting the wrongdoer to an attorney's fee when judgment is recovered against him in favor of one whom he has wronged: *Kansas Pac. Ry. Co. v. Mower*, 16 Kan. 573. Hence, a railway corporation which, in violation of such a statute, has made an overcharge may be compelled, in a suit to recover the amount thereof, to pay an attorney's fee to the plaintiff, for a statute which includes the attorney's fee as a part of the penalty, in such a case, is not obnoxious to the constitution as being partial and unequal legislation: *Dow v. Beldelman*, 49 Ark. 455, 456, 5 S. W. 718; *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98. The legislature may prescribe rules permitting the recovery of an attorney's fee in one class of cases and deny it in all others. A statute which permits the plaintiff, in an action against a railroad company for a violation of its provisions, to recover, in addition to the damages therein provided for, an attorney's fee, confers no special privilege prohibited by the constitution, nor can it be regarded as imposing a penalty for exercising the right of defense: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98.

The guaranty of equal protection of the law is not to be understood as requiring that every person in the land shall possess the same rights and privileges as every other person. The protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed; but the classification must be based on reasonable grounds; it cannot be a

mere arbitrary selection: See *State v. Broadbelt*, 89 Md. 565, 579, 73 Am. St. Rep. 201, 205, 43 Atl. 771. In cases of wrongs or torts, there can be no arbitrary classification of litigants imposing an attorney's fee on some and exempting others equally guilty or equally guiltless: Note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 173; but where a law is general and uniform throughout the state, and operates alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation, as where fire insurance companies are made answerable for an attorney's fee in case of judgment against them: *Insurance Co. v. Bachler*, 44 Neb. 549, 565, 62 N. W. 911. Statutes authorizing an attorney's fee in cases against railroad companies, where judgment is recovered against them for injuries caused by fire, do not violate the equality clause of the fourteenth amendment to the federal constitution: *Clark v. Ellithorpe* (Kan. App., Jan. 1898), 51 Pac. 940; and a statute allowing the plaintiff a reasonable attorney's fee in an action to recover the value of lands of which a railroad company has taken possession without first compensating the owner is not unconstitutional in any sense: *Cameron v. Chicago etc. Ry. Co.*, 63 Minn. 384, 386, 65 N. W. 652.

DEAN v. STATE.

[41 Fla. 291, 26 South. 638.]

LARCENY—TAKING PROPERTY UNDER CLAIM OF TITLE.—In all cases where one in good faith takes another's property under claim of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim may be in fact. And the same is true where the taking is on behalf of another, believed to be the true owner. Still, if the claim is dishonest, a mere pretense, it will not protect the taker.

LARCENY—PRESUMPTION OF NO FELONIOUS INTENT—NECESSITY OF REPELLING.—If property is taken openly, and there is no subsequent attempt to conceal it, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction for larceny is authorized.

CRIMINAL LAW—PUNISHMENT.—When the primary penalty imposed for a crime is a fine and costs of prosecution only, an imprisonment for the nonpayment of such fine and costs should be in the county jail instead of in the state penitentiary.

John H. Carter, for the plaintiff in error.

Attorney General, for the defendant in error.

292 TAYLOR, C. J. At the spring term, 1898, of the circuit court of Jackson county the plaintiff in error was convicted

of the crime of larceny of an ox, and was sentenced to pay a fine of one hundred and fifty dollars and costs, and in default in the payment thereof that he be confined at hard labor in the state penitentiary for the period of six months. A reversal of this judgment is sought by writ of error.

The only error assigned and urged is, that the evidence was not sufficient to sustain a conviction. The defense set up was that the ox alleged to have been stolen was not taken with the *animo furandi* necessary to the crime of larceny, but was taken with the bona fide belief on the part of the defendant that the ox belonged to him, and that he had a right to take it. Some of the testimony for the state, and the evidence for the defendant, tended strongly to sustain such defense. It showed that the defendant took the ox about midday openly, in the presence of several persons, whose assistance he procured in capturing it, asserting at the time that the animal was his property, and that he led it off on the public highway to his home in the neighborhood; that he sold it shortly afterward to another party in the same neighborhood, and the party to whom he sold it worked and drove it around in the neighborhood where the prosecuting and alleged owner lived, frequently driving it to a small town where the prosecuting and alleged owner had his home—several witnesses, and the defendant himself, swearing positively that the animal belonged to the defendant, that he had raised it from a calf, and still owned its mother. The alleged owner and prosecuting witness testified simply that the animal belonged to him, that he had missed it for about ²⁹³ a year, and that when it voluntarily came up to his place it had a bell on, and that one of his employes turned it in his inclosure; that shortly afterward the defendant's wife and several other parties came to his place and after looking at the animal in his pasture laid claim to the ox as being the property of the defendant. The bell that the animal had on when it came up to the prosecutor's place was shown to belong to the party to whom the defendant had sold the ox. There was no evidence tending to show any concealment on the part of the defendant either of the fact of his having taken the ox or of his assertion of ownership thereof, or of the fact of his having sold it to the third party to whom he did sell it, and there was nothing to show any alteration or obliteration of the animal's marks, though there was testimony to show that the ox was in the mark of the prosecutor and not in that of the defendant. There was testimony also to show that the defendant, after the ox had been taken

possession of by the prosecuting witness, applied to a justice of the peace for process to recover possession of the animal from the prosecuting witness.

The rule as laid down in 2 Bishop's Criminal Law, section 851, and approvingly cited in *Baker v. State*, 17 Fla. 406, and in *Charles v. State*, 36 Fla. 691, 18 South. 369, is that: "In all cases where one in good faith takes another's property under claim of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim may in fact be. And the same is true where the taking is on behalf of another, believed to be the true owner. Still, if the claim is dishonest—a mere pretense—it will not protect the taker." And in *Baker v. State*, 17 Fla. 406, this court said: "The gist of the offense is the intent to deprive another of his property in a chattel either for gain or out of wantonness or malice ²⁰⁴ to deprive another of his right in the thing taken. This cannot be where the taker honestly believes the property is his own or that of another, and that he has a right to take possession of it for himself or for another, for the protection of the latter." Another rule, clearly and correctly laid down, as we think, in *McMullen v. State*, 53 Ala. 531, is that "where the taking is open, and there is no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence, before a conviction is authorized." Applying these principles to the facts as disclosed by the record in this case, we think that the ends of justice will best be subserved by the grant of another trial to the defendant, as, in our judgment, the evidence gives rise to a strongly reasonable doubt as to the presence in the case of that intent to steal that is necessary to make out larceny.

It is proper for us to point out another error in the sentence imposed, though it has not been assigned as error, and no notice of it is taken in the briefs of counsel. The primary penalty imposed here was a money fine and the costs of prosecution, but in case of default in the payment of such fine and costs the defendant was sentenced to imprisonment in the state penitentiary. This court has repeatedly held that under the provisions of chapter 4026 of the act of 1891, where the primary punishment imposed was a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for nonpayment of such fine and

costs: *Bueno v. State*, 40 Fla. 160, 23 South. 862; *Eggart v. State*, 40 Fla. 527, 25 South. 144.

The judgment of the court below is reversed and a new trial awarded to the defendant.

LARCENY—TAKING PROPERTY UNDER CLAIM OF TITLE. Intent to steal is necessary to constitute larceny: *State v. Shores*, 31 W. Va. 491, 13 Am. St. Rep. 875, 7 S. E. 413. Hence, a defendant is not guilty of larceny in taking property under a fair color of claim or title: *Causey v. State*, 79 Ga. 564, 11 Am. St. Rep. 447, 5 S. E. 121; although he may be mistaken: *State v. Homes*, 17 Mo. 379, 57 Am. Dec. 269; and the publicity of the taking is very powerful evidence of the good faith of the claim: *Causey v. State*, 79 Ga. 564, 11 Am. St. Rep. 447, 5 S. E. 121.

LARCENY—OPEN TAKING.—A STRONG PRESUMPTION arises, on a prosecution for larceny, that there was no felonious intent, if the taking was open and notorious, and there was no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking: *Black v. State*, 83 Ala. 81, 3 Am. St. Rep. 691, 3 South. 814.

CRIMINAL LAW—PUNISHMENT.—In California, though a statute authorizes one convicted of assault with a deadly weapon to be punished by "imprisonment in the state prison or in a county jail not exceeding two years, or by fine not exceeding five thousand dollars, or by both," a court sentencing a prisoner to the state prison and to the payment of a fine cannot require him to be imprisoned in such prison until the fine is paid. That part of the sentence can be enforced only by confinement in a county jail: *Note to Ex parte Bryant*, 12 Am. St. Rep. 204.

STATE v. CALL.

[41 Fla. 442, 26 South. 1014.]

A JUDGE IS NOT DISQUALIFIED ON THE GROUND OF INTEREST unless he is pecuniarily and directly or immediately interested in the very issue in question. His interest must not be remote, uncertain, or speculative.

A JUDGE IS DISQUALIFIED ON THE GROUND OF INTEREST, in a suit to enjoin county commissioners from levying a specific tax, of a certain amount, on the taxpayers of a school sub-district, within the limits of a city, though such district is of itself a corporation, where the judge is the owner of property therein subject to taxation.

JUDGES—DISQUALIFICATION.—A **STATUTE** declaring what are not disqualifications of a judge should not be so construed as to embrace cases not clearly within its letter and spirit, particularly if its purpose is to make a judge sit in the trial of a case in which he is directly interested, though as a taxpayer in common with others.

JUDGES.—A STATUTE DECLARING THAT NO JUDGE SHALL BE DISQUALIFIED, where a county or municipal cor-

poration is a party, on the ground of his being a resident and taxpayer therein, does not remove his disqualification from sitting in a case where it is sought to enjoin county commissioners from levying a special tax of a certain amount on the taxable property of a quasi corporation, such as a school subdistrict, situated within the limits of a city, and where the judge has property in such district subject to taxation, as neither the city nor the county is a party to the suit, or a party in interest, and the district cannot be classed as a municipal corporation, such as was intended by the statute.

W. B. Young, for the relator, Hart.

Fleming & Fleming, for the respondent.

443 MABRY, J. The honorable R. M. Call, judge of the fourth judicial circuit, adjudged himself disqualified to preside in and try a certain cause pending in the Duval circuit court, and this is an original proceeding by mandamus to compel him to vacate the order of disqualification and to proceed with the hearing and determination of the case.

It is made to appear that an election was held in the city of Jacksonville on the 20th of June, 1899, to determine ⁴⁴⁴ whether the city should be a school subdistrict, for the election of three trustees therefor, and to determine the millage to be assessed and collected on the property of the district; that three named persons claim to have been elected such trustees at said election, and have prepared an itemized estimate showing the amount of money required for necessary school purposes of said district, and have filed the same with the clerk of the board of county commissioners of Duval county, with a written request that said board levy and have collected on the taxable property situated in said city a special school tax of three mills for the year 1899.

S. H. Hart, a registered voter and taxpayer of the city of Jacksonville, filed a bill against the county commissioners of Duval county alleging that said election was void for reasons stated, and seeking to restrain the levy of the special three-mill tax on the property of any taxpayers of the city, and it was in this suit that the judge held himself to be disqualified on account of interest, he being the owner of real property situated in the city of Jacksonville subject to taxation.

Section 967 of the Revised Statutes provides that "no judge of any court shall sit or preside in any cause to which he is a party or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried by a qual-

ified tribunal." Section 970 provides that "any and all judgments, decrees, and orders, except an order for the trial of the cause as hereinbefore provided, made by a judge so disqualified, shall be of no force or validity, and shall be null and void." These provisions were enacted in December, 1862.

⁴⁴⁵ It was said in *Trustees etc. Fund v. Bailey*, 10 Fla. 213, 229, 81 Am. Dec. 194, that this legislation was nothing more than a declaration of the common law, except, it may be, that part declaring judgments, decrees, and orders made by an incompetent judge to be absolutely void. It was also decided that the disqualification must be a valid one in law, and that before a judge was disqualified on account of interest he must be immediately interested in the very issue in question and his interest must not be remote, uncertain, or speculative. It was not claimed in the *Bailey* case that the judges were disqualified by reason of being interested as taxpayers, and the conclusion reached by the court on the ground of disqualification alleged is not directly pertinent to the point involved in the instant suit, and hence need not be affirmed or disapproved. It is important, however, to the present inquiry to note that the statute of 1862 (now section 967 of the Revised Statutes) was construed to require an immediate interest on the part of the judge in the issue in question in order to disqualify, and that a remote, uncertain, or speculative interest would not suffice for the purpose. The disqualifying interest must be a pecuniary or property interest in the action or its result: *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, 4 South. 525. Other courts have entertained the view that, under constitutional or statutory provisions declaring the disqualification of the judge when interested in a cause, the disqualifying interest must be pecuniary, immediate, and certain: *Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668; *Dallas v. Peacock*, 89 Tex. 58, 33 S. W. 220; *Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 Pac. 268; *Meyer v. San Diego*, 121 Cal. 102, 66 Am. St. Rep. 22, 53 Pac. 434. The distinction drawn in these cases goes to the ⁴⁴⁶ extent that when a suit is instituted against a county or municipal corporation to establish a liability, such as a suit to obtain a judgment for damages or a liability against the corporation, the judge, though a taxpayer of the county or municipality, is not disqualified to sit in the trial of the cause, as his interest is not direct or certain. But when the suit is instituted to restrain the collection of a tax fixed and ascertained, and resting upon the taxable property of a county or municipal corporation, then the judge who owns

taxable property in the county or corporation would be disqualified as having a direct interest in the result of the litigation before him.

The supposed establishment of the school subdistrict in the city of Jacksonville appears to have been under the act of 1895, chapter 4336, as the election is alleged to have taken place on the 20th of June, 1899, before the act of this year, 1899, chapter 4678, went into effect. To what extent this latter act will affect the district if properly organized is not a matter of concern now. Under the act of 1895, *supra*, it seems that the millage to be assessed and collected on the property of the district, and to be submitted for that purpose by the district trustees to the county commissioners, must receive the approval vote of a majority of the qualified voters of the district having real or personal property therein subject to taxation. The commissioners have no discretion as to the amount of the tax levy, and are required to assess and have collected the millage submitted in the estimate of the trustees and approved by vote of the qualified voters.

It is evident that Judge Call was directly interested in the result of the suit instituted before him by Hart, as a successful termination of it in the latter's favor will ⁴⁴⁷ directly relieve the judge's property situated in the district of its proportion of the three-mill tax sought to be enjoined. The suit was to declare the election establishing the school subdistrict illegal, and to restrain the assessment and collection of any portion of the three-mill tax on any portion of the property of the district. The judge's property interest in the district was common with that of complainant Hart and all other taxpayers therein. If no other legislation existed in this state than the sections of the Revised Statutes referred to, no doubt could arise as to the disqualification of the judge in the present case.

Some eight years after the passage of the act of 1862 the legislature enacted what is now found in section 968 of the Revised Statutes, as follows: "No judge shall be disqualified from sitting in the trial of any suit in which any county or municipal corporation is a party, by reason that such judge is a resident or taxpayer within such county or municipal corporation." Was it the purpose of this provision to qualify a judge to sit in a case in which a county or municipal corporation is a party when he is directly interested in the result by reason of being a resident or taxpayer of the county or corporation? Lord Coke said the principle that a party could not be judge in his own case was

so fundamental that parliament could not lawfully invest him with authority so to do: Cooley's Constitutional Limitations, 6th ed., 506. Judge Cooley says (Cooley's Constitutional Limitations, 6th ed., 508): "It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be that the interest is so remote, trifling, and insignificant that it may fairly be supposed to be incapable ⁴⁴⁸ of affecting the judgment or of influencing the conduct of an individual." It was held in *State v. Crane*, 36 N. J. L. 394, that disqualifications by reason of interest that are common to all taxpayers may be removed by the legislature, but that body had no power to authorize a party to decide his own cause where his interest was direct and peculiar.

There are other authorities bearing upon the power of the legislature to remove disabilities of judges by reason of interest, but a reference to them need not be made, as it is not deemed necessary to determine now whether the legislature intended by section 968 of the Revised Statutes to make a judge qualified in the cases therein mentioned when he was directly interested in the result of the suit, and, if so, whether it was competent for the legislature to so provide.

In the opinion of the court the suit of Hart against the county commissioners for the purposes therein disclosed is not one in which a county or municipal corporation is a party within the meaning of section 968, and as Judge Call is clearly disqualified by reason of interest, independent of that section, any further construction of it becomes unnecessary. This section, declaring what are not disqualifications, should not be so construed as to embrace cases not clearly within its letter and spirit, especially so if its purpose was to make a judge sit in the trial of a case in which he is directly interested, though as a taxpayer in common with others. The county of Duval as a county entity is not a party to the suit instituted by Hart, nor is the county in the capacity mentioned a party in interest. The school subdistrict is made a corporate being by the statute, but it does not stand for or represent the county. ⁴⁴⁹ The county commissioners may be said to represent the school district in the levy and collection of the district tax, but the county as a corporate entity has no interest in the school district tax, which is something separate and additional to the general school tax for the benefit of the entire county. It cannot be said that the

county of Duval is a party to the suit. Neither is the municipal corporation of the city of Jacksonville a party to the suit, or a party in interest. True it is that the territory embraced within the limits of the city of Jacksonville is sought to be organized into the school subdistrict, but this does not clothe it with the municipal functions of the municipality of Jacksonville. The municipal corporation of the city of Jacksonville is a political entity entirely different from the school subdistrict corporation, nor can the latter of itself be regarded as a municipal corporation within the meaning of section 968 of the Revised Statutes. It is declared by statute to be a corporation, but it is quasi and limited in character, and, though public, cannot be classed as a municipal corporation such as was intended by the statute: *State v. Leffingwell*, 54 Mo. 458; *Schultes v. Elberly*, 82 Ala. 242, 2 South. 345; *People v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202; 1 *Dillon on Municipal Corporations*, 4th ed., secs. 19, 22.

No question was raised as to the remedy in this case, and, without reference to it, the opinion of the court is that the circuit judge properly held himself to be disqualified to sit in the cause; and it is, therefore, ordered that the peremptory writ of mandamus be denied.

A JUDGE IS DISQUALIFIED, ON THE GROUND OF INTEREST, when he has, in the litigation, some certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered. A judge who is the owner of real property taxable for the payment of a bonded indebtedness, the validity of which is in question in the suit, and which property, if such validity is maintained in such suit, will be subject to special taxes for a period of years directly affecting the value of all property subject thereto, is interested in such suit, and hence disqualified to sit or to act therein under a statute prohibiting any judge from acting in a suit wherein he is interested: *Meyer v. San Diego*, 121 Cal. 102, 66 Am. St. Rep. 22, 53 Pac. 434.

A JUDGE IS NOT DISQUALIFIED, ON THE GROUND OF INTEREST, by reason of having an incidental interest in the case, not pecuniary: *Clyma v. Kennedy*, 64 Conn. 310, 42 Am. St. Rep. 194, 29 Atl. 539. The interest which disqualifies is a property interest in the action or its result, in contradistinction to an interest of feeling, or sympathy, or bias that would disqualify a juror: *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1.

STATE v. WALL.

[41 Fla. 463, 26 South, 1020.]

AFFINITY—DEFINITION.—**AFFINITY** is the tie between a husband and the blood relatives of his wife, and between a wife and the blood relatives of her husband, but it does not exist between the blood relatives of either party to the marriage and those of the other.

AFFINITY.—**A HUSBAND AND WIFE** are not related to each other by affinity, but are regarded, in law, as one person.

TRIAL—AFFINITY AS A GROUND OF CHALLENGE.—**IF A JUROR** is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted.

JUDGES—DISQUALIFICATION — AFFINITY — HUSBAND OR WIFE OF BLOOD RELATIVE.—When a judge is disqualified to sit in a case because a blood relative of his wife is a party, he should likewise be excluded when the husband or wife of such relative is a party, for they should be regarded as one person, so far as the matter in litigation is involved.

JUDGES —DISQUALIFICATION—AFFINITY—HUSBANDS OF AUNT AND NIECE.—Under a statute disqualifying a judge when he would be excluded from being a juror by reason of his affinity to either of the parties, the husbands of an aunt and niece of the full blood are so related to each other as to disqualify the one from sitting as judge in a case in which the other is an interested party.

Gumby & Gibbons and C. C. Whitaker, for the relator.

Sparkman & Carter, for the respondent.

463 MABRY, J. This is a proceeding by mandamus to compel the honorable Joseph B. Wall, judge of the sixth judicial circuit, to take cognizance of and determine a certain cause pending in Hillsborough county, in said circuit, wherein Solon B. Turman is complainant and Rita Perez et al. are defendants, and in which it is made to appear that said judge has refused to act on the ground that he is disqualified.

The ground of disqualification relied on by the judge in his answer is that his wife and the father of the wife of complainant, Solon B. Turman, were brother and sister of the full blood, and that his (judge's) wife and the wife of Solon B. Turman were still living. The question is whether the husbands of an aunt and niece of the full blood are so related to each other as to disqualify **464** the one from sitting as judge in a case in which the other is an interested party.

Our statute provides that "no judge of any court shall sit or preside in any cause to which he is a party or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the

parties; nor shall he entertain any motion in the cause other than to have the same tried by a qualified tribunal": Rev. Stats., sec. 967.

It has been correctly stated that "the common law was watchful over the purity of the jury trial, and to secure the fair administration of justice, guarded against the influence of those passions most likely to pervert the judgment of men in deciding upon the conduct and controversies of their fellowmen": *Jaques v. Commonwealth*, 10 Gratt. 690. Challenges were allowed to the polls, in capita, which were exceptions to particular jurors, and they were also either principal or to the favor. "A third ground of challenge to the polls is propter affectum, as that a jurymen is of kin to either party within the ninth degree": 2 Tidd's Practice, 853. And this was a principal challenge. The venire facias commanded the sheriff to summon twelve good and lawful men of the body of the county, qualified according to law, by whom the truth of the matter might be the better known, and who were in nowise of kin to either party, to make the jury: 2 Tidd's Practice, 778. Under this writ, relations by affinity were excluded from the jury, as Lord Coke says affinity in one sense is taken for consanguinity or kindred, as in the writ of venire facias; that affinity is a principal challenge of a juror and equivalent to consanguinity when it is between either of the parties, as if the plaintiff or defendant marry the daughter or cousin of the juror, or ⁴⁶⁵ the juror marry the daughter or cousin of the plaintiff or defendant, and the same continues, or issue be had: Coke on Littleton, 157.

It has been decided by this court that relationship, either by consanguinity or affinity to one of the parties to a suit, within the ninth degree, is, by the common law, a ground of principal challenge of a juror: *O'Connor v. State*, 9 Fla. 215; *Morrison v. McKinnon*, 12 Fla. 552. It was held in *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1, that affinity is the tie between a husband and the blood relatives of the wife, and between a wife and the blood relatives of the husband, but it does not exist between the blood relatives of either party to the marriage and those of the other, and consequently no affinity existed between a brother of a wife and the brother of her husband, so as to disqualify the husband's brother from presiding in a trial where the wife's brother was charged with crime. The principle stated that no affinity exists between the respective blood relatives of the parties to the marriage is unquestionably true, and was decisive of the

case, and it is also true, as a general rule, that affinity only exists between a husband and the consanguinei of his wife, and vice versa, between a wife and the consanguinei of her husband. The dictionaries generally define direct affinity to be the relation brought about by marriage between a husband and the kindred of his wife, and between a wife and the kindred of her husband.

Under the rule stated, Judge Wall is related by affinity to Solon B. Turman's wife within the ninth degree, whether we reckon according to the canonical rule or by the civil law, she being the niece of the full blood of the judge's wife, and he could not, of course, preside in a case where she was an interested party; but how stands ⁴⁶⁶ it when the niece's husband is a party? It was decided in *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288, that in such a case the judge was disqualified. In Tennessee it was held that a judge was not disqualified by affinity to sit in a case where his wife's sister's husband was an interested party. Judge Cooper, in speaking for the court (*Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290), says that "affinity, as distinguished from consanguinity, signifies the relation which each party to a marriage, the husband and the wife, bears to the kindred or blood relations of the other. The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other"; but "the relationship by affinity does not extend further, and hence the maxim, '*Affinis mei affinis non est mihi affinis*'—a person related by affinity to one who is related to me by affinity is not related to me by affinity." The rule stated is all right, but its application to the facts of the case causes us trouble. A judge undoubtedly is related by affinity to his wife's sister, her blood relative, but the sister's husband is not so related under the rule, according to this decision, because he is the *affinis* of his wife. We do not think it can be maintained that a husband is related to his wife by affinity. They are embraced in the definition of neither affinity nor consanguinity, but are regarded in law, as correctly stated by Judge Cooper, as one person. If we undertake to apply the rule of affinity to the relation of husband and wife, we cannot exclude the husband from sitting in a case where his wife has the right to sue alone and is an interested party, as they are not related to each other by affinity or consanguinity, and no one would ever suppose that this was permissible. We ad-

mit that a decided ⁴⁶⁷ majority of the American courts, as shown by cases cited, in applying the rule of affinity have announced conclusions that would not disqualify a judge to sit in a case where the husband of his wife's niece was an interested party: *Higbee v. Leonard*, 1 Denio, 186; *Eggleston v. Smiley*, 17 Johns. 133; *Rector v. Drury*, 4 Chand. 24; *Chinn v. State*, 47 Ohio St. 575, 26 N. E. 986; *Kirby v. State*, 89 Ala. 63, 8 South. 110; *Deupree v. Deupree*, 45 Ga. 415; *Oneal v. State*, 47 Ga. 229; *Johnson v. Richardson*, 52 Tex. 481; *Moses v. State*, 11 Humph. 232; *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144; *Bank v. Shewey*, 4 Watts, 218; *Chase v. Jennings*, 38 Me. 44; *Tegarden v. Phillips*, 14 Ind. App. 27, 42 N. E. 549; but they proceed upon the theory, it seems to us, that the relation of husband and wife is one of affinity, and the rule as to such relation is applied. We are of opinion that they should be regarded as one person in law, so far as the question under consideration is concerned, and this will disqualify a judge where any blood relative of his wife, within the ninth degree, or the husband or wife of such relative is an interested party. Principal challenges or to the favor of jurors proceeded upon the ground that they were biased in favor of one of the parties and thereby rendered unfit to determine the truth of the matter to be submitted to them. When they were interested in the matter to be tried, or were of kin to either party in the ninth degree, there was such a manifest presumption in law of partiality as to set them aside as for a principal cause of challenge, and when the challenge was to the favor it was determined by triers. Our statute disqualifies a judge when he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties, ⁴⁶⁸ and whatever interest, consanguinity, or affinity that would in law exclude a juror as for principal cause of challenge will disqualify the judge. The statement of the rule by Chitty, in his book on Criminal Law, volume 1, 541, 542, is as follows: "The third description of challenges are those which arise propter affectum; or on the ground of some presumed or actual partiality in the juryman who is made the subject of objection, for the writ, requiring that the jury should be free from all exception, and have no affinity to either party, must evidently include both these grounds of challenge. If, therefore, the juror is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted." In *Mounson v. West*,

1 Leon. 88, it is stated that it had been held a principal challenge where the sheriff's wife was sister to plaintiff's wife, and where the brother of the defendant's wife had married the daughter of the sheriff; and it was decided by Chancellor Walworth (*Paddock v. Wells*, 2 Barb. Ch. 331) that "relationship by affinity may exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity": See, also, note to *Cain v. Ingham*, 7 Cow. 478; *Marshall v. Eure*, 1 Dyer, 46; *New York etc. R. R. Co. v. Schuyler*, 28 How. Pr. 187.

Our judgment is that whenever a judge will be disqualified to sit in a case because a blood relative of his wife is a party, he will likewise be excluded when the husband or wife of such relative is a party, as they should be regarded as one person in interest and in law, so far as the matter in litigation is involved. The result is that ⁴⁶⁹ the peremptory writ of mandamus will be denied, and it will be so ordered. As the writ must be denied on the ground stated, we do not consider the propriety of the remedy resorted to in this case: See *State v. Call*, 41 Fla. 450, 26 South. 1016. Order to be entered denying peremptory writ.

JUDGES—DISQUALIFICATION—AFFINITY.—Relationship or affinity to either party in interest disqualifies a judge: *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. In New Hampshire, a judge related to either party within the fourth degree is not qualified to sit in the case: *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417; and the Tennessee statute limits the incompetency of a judge, either by consanguinity or affinity, to the sixth degree, computing by the civil law: *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290. The affinity which disqualifies a judge to sit in a case is the tie arising from marriage between the husband and the blood relations of his wife, and between the wife and the blood relations of her husband: *Ex parte Harris*, 26 Fla. 77, 7 South. 1, 23 Am. St. Rep. 548, and note showing that a judge is not disqualified from sitting in a case for the reason that his wife is a cousin of one of the parties; nor because his brother is the attorney for one of the litigants; that, in Vermont, a deposition cannot be excluded merely because the party offering it is a second cousin of the magistrate before whom it was taken; but that a judge is disqualified when he himself is a nephew or cousin of one of the parties. A judge is not disqualified, by affinity, from hearing a cause in which his wife's sister's husband is a party: *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290. That a judge's kinship to a stockholder of a corporation does not disqualify him from sitting in a proceeding to which the corporation is a party, see *Matter of Dodge*, 77 N. Y. 101, 33 Am. Rep. 579; but it has been held that the fact that his wife is a stockholder in a corporation disqualifies him, on the ground of interest, from trying a cause in which it is a

party plaintiff: *First Nat. Bank v. McGuire*, 12 S. Dak. 226, 76 Am. St. Rep. 598, 80 N. W. 1074. In England no relationship existing between a judge and a party is a disqualification: *Patterson v. Collier*, 75 Ga. 419, 58 Am. Rep. 472; note to *Moses v. Julian*, 84 Am. Dec. 127.

TRIAL—AFFINITY AS A GROUND OF CHALLENGE.—The relationship of kindred disqualifies a juror if he is related to either of the parties within the ninth degree, and relationship by affinity, both at common law and under the statutes of a majority of the states, is as potent a cause of disqualification as by consanguinity: See monographic note to *Commonwealth v. Brown*, 9 Am. St. Rep. 744, 753, 754, on the rejection of a juror for bias.

Who are Related by Affinity.*

There are but two kinds of relationship known to the law—relationship by consanguinity and relationship by affinity: *Oneal v. State*, 47 Ga. 229, 248. Affinity is an artificial relationship: *Tegarden v. Phillips*, 14 Ind. App. 27, 32, 42 N. E. 549; which arises from marriage between one of the spouses and the blood relations of the other: *Chinn v. State*, 47 Ohio St. 575, 26 N. E. 986; epitomized in the note to *State v. Brown*, 21 Am. St. Rep. 796, 797; *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288; *Kirby v. State*, 89 Ala. 63, 8 South. 110; *Solinger v. Earle*, 13 Jones & S. 80, 84; *Tegarden v. Phillips*, 14 Ind. App. 27, 33, 42 N. E. 549; *Paddock v. Wells*, 2 Barb. Ch. 331; *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1; *Blacklock v. Waldrup*, 84 Ga. 145, 20 Am. St. Rep. 350, 10 S. E. 622; *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290; note to *Commonwealth v. Brown*, 9 Am. St. Rep. 754, on the rejection of jurors for bias; and see the principal case. A husband is related by affinity to the blood relations of his wife, and the wife by affinity to the blood relations of her husband, but not otherwise by affinity. Thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, and uncles are allied in the same way to my wife. While the marriage tie remains unbroken the blood relatives of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her, and the blood relatives of the husband stand in the same degree of affinity to the wife as they do in consanguinity to him: *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288; *Paddock v. Wells*, 2 Barb. Ch. 331. The father of a wife stands in the first degree of affinity to his son in law, as he does in the first degree of consanguinity to his daughter: *Paddock v. Wells*, 2 Barb. Ch. 331, 333. A man is related to his wife's brother by affinity: Note to *State v. Brown*, 21 Am. St. Rep. 797; *Chinn v. State*, 47 Ohio St. 575, 580, 26 N. E. 986.

Each party to a marriage becomes related to all the consanguineal of the other party thereto, but these respective consanguineal do not become related by affinity to each other. Otherwise expressed, there is no affinity between the blood relatives of the husband and

***REFERENCES TO MONOGRAPHIC NOTES.**

Degrees of consanguinity and affinity, how computed: 56 Am. Dec. 293, 294.
Rejection of jurors for bias: 9 Am. St. Rep. 744-760.

the blood relatives of the wife. Relationship by affinity does not extend to the nearest relatives of the husband and wife so as to create a mutual relation between them: *Blalock v. Waldrup*, 84 Ga. 145, 20 Am. St. Rep. 350, 10 S. E. 622; *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290; *Blodget v. Brinsmaid*, 9 Vt. 27, 30; *Higbe v. Leonard*, 1 Denio, 186; *Paddock v. Wells*, 2 Barb. Ch. 331; *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1; *Tegarden v. Phillips*, 14 Ind. App. 27, 33, 42 N. E. 549. Relationship by affinity always depends upon the blood of the two spouses, and cannot extend beyond such blood kindred. The affinity relatives of the respective spouses are excluded. Thus, my wife's brother's wife is related to my wife by affinity because of the blood relationship existing between my wife and her brother; but she is not related to me by affinity, because there is no blood in common between us. In other words, the affinity relatives of my wife are not my affinity relatives, and vice versa: *Tegarden v. Phillips*, 14 Ind. App. 27, 33, 42 N. E. 549; *Chinn v. State*, 47 Ohio St. 575, 26 N. E. 986; note to *State v. Brown*, 21 Am. St. Rep. 797; *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290. It is equally true that although a man is related to his wife's sister by affinity, he is not so to his wife's sister's husband: *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290.

There is no affinity between a husband's brother and the wife's sister, because such a connection is formed, not between one of the spouses and the kinsmen of the other, but between the kinsmen of both: *Chinn v. State*, 47 Ohio St. 575, 26 N. E. 986; *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1; and the same is true of the husband's brother and the wife's brother: *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1. The father of a son whose wife is the aunt of the plaintiff is not connected by affinity with the plaintiff, nor vice versa, for the son only has formed the connection, with which the father is not affected: *Waterhouse v. Martin*, Peck, 373, 390. Notwithstanding some cases, which we shall notice further on, and which hold that relationship by affinity may exist between a husband and one who is connected by marriage with a blood relative of his wife, the view that affinity does not extend beyond the blood relations of husband or wife seems to be supported by the weight of authority: *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290; *Blalock v. Waldrup*, 84 Ga. 145, 20 Am. St. Rep. 350, 10 S. E. 622; *Ex parte Harris*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 South. 1; *Chinn v. State*, 47 Ohio St. 575, 26 N. E. 986; *Tegarden v. Phillips*, 14 Ind. App. 27, 33, 42 N. E. 549; *Deupree v. Deupree*, 45 Ga. 414; *Waterhouse v. Martin*, Peck, 373, 389; and it is, therefore, a maxim that a person related by affinity to one who is related to me by affinity is not related to me by affinity: *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290.

The question as to who are related by affinity comes up most frequently in questions concerning the disqualification of judges

or jurors, and it may make our subject clearer to give a few illustrations of affinity in such cases. Under a statute extending and applying the prohibition of the common law, relative to jurors sitting in cases of kinship or affinity by marriage to judges, and disqualifying them within the prohibited degrees, which at common law have been held to extend to the ninth, a judge who is a nephew by marriage of one of the complainants, and a cousin of the other two, is disqualified: *Horton v. Howard*, 79 Mich. 642, 19 Am. St. Rep. 198, 44 N. W. 1112. There is no relation by affinity between a justice of the peace and the plaintiff, whose two sisters have married two brothers of the justice: *Higbe v. Leonard*, 1 Denio, 186; or between a party to a suit and the judge, whose son's wife is the aunt of such party: *Waterhouse v. Martin*, Peck, 373, 390. A justice of the supreme court who becomes by marriage a first cousin, or cousin-german, of one of the stockholders of a defendant corporation is not related to such stockholder by affinity within the third degree: *Robinson v. Southern Pac. Co.*, 105 Cal. 526, 557, 38 Pac. 94, 722; and the affinity between a judge, who is half-uncle of the plaintiff's wife, and the plaintiff, is too remote to disqualify him from acting: *Eggleston v. Smiley*, 17 Johns. 133. A judge is not disqualified by affinity from hearing a cause in which his wife's sister's husband is a party: *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290. So, a justice of the peace, whose wife is a cousin of the wife of a party to the action, is not disqualified to sit therein on the ground of relationship. The justice and the party in such case are not related by affinity: *Blalock v. Waldrup*, 84 Ga. 145, 20 Am. St. Rep. 350, 10 S. E. 622: "The party," said Blandford, J., "having married a cousin of the justice's wife, was not thereby brought within any of the degrees of consanguinity or affinity. Had the party married the justice's cousin, or the justice married the party's cousin, he would have been disqualified. Nothing of that kind was done in this case. The two women, the wife of the party and the wife of the justice, were related by consanguinity; but this did not render either the justice or the party related in any degree whatever, they being merely the husbands of these cousins. The husband of the cousin, who was a party in this case, was related to the wife of the justice by affinity, but not to the justice; and while the justice may have been related by affinity to the wife of the party, he was not related by affinity to the party himself": *Blalock v. Waldrup*, 84 Ga. 145, 20 Am. St. Rep. 350, 10 S. E. 622. A judge is not disqualified on the ground that his wife's sister in law is married to the defendant: *Fort v. West*, 53 Ga. 584. A judge, who is a brother in law to the plaintiff, is not disqualified on the ground that he is "near of kin": *Rector v. Drury*, 4 Chand. 24.

Relationship of kindred within the ninth degree disqualified a juror at common law: Note to *Commonwealth v. Brown*, 9 Am. St. Rep. 753. Hence, a juror is disqualified, on the ground of con-

sanguinity within the ninth degree, where the complainant is his third cousin, because third cousins are related in the eighth degree: *People v. Clark*, 62 Hun, 84. Relationship by affinity to one of the parties within the ninth degree was, also, by the common law a ground of challenge to a juror: *Morrison v. McKinnon*, 12 Fla. 552; *Paddock v. Wells*, 2 Barb. Ch. 331. In *Williamson v. Mayer*, 117 Ala. 253, 23 South, 3, it was held that there was no error committed by the trial court, in excusing, of its own motion, a juror on the ground that he was first cousin to the defendant's son in law. Statutes have been enacted in many of the states under which persons are permitted to act as jurors, though more closely related to some of the parties than would have been permitted by the common law: Note to *Commonwealth v. Brown*, 9 Am. St. Rep. 753.

The disqualification of a juror, if it exists, results either: 1. From the relation of the juror's wife to a party to the action; or 2. From the relation of the juror to the wife of such party. If the objection to the juror is based on his marriage to a relative of a party to the action, the test is to inquire whether the wife of the juror would be competent to try the cause if her sexual disqualification were removed; if, on the other hand, the objection is on the ground of the marriage of a party to a relative of the juror, the test is to inquire whether the juror would be competent to try the action if such relative were a party thereto: Note to *Commonwealth v. Brown*, 9 Am. St. Rep. 754. As falling within the first class, a juror should be excluded when his wife is a sister of a brother of the plaintiff's husband: *Dearmond v. Dearmond*, 10 Ind. 191, 192; or a sister of a person who is bound for the payment of the judgment in case it goes against the defendant: *Woodbridge v. Raymond*, Kirby, 280; or sister of a person who had a cause pending depending on the same principle: *Hartford Bank v. Hart*, 3 Day, 491, 3 Am. Dec. 274; or where the juror's wife is a daughter of the defendant's brother: *Den v. Clark*, 1 N. J. L. 446. As falling within the second class, a juror should be excluded if the wife of a party is his niece: *Trullinger v. Webb*, 3 Ind. 198; *Dailey v. Gaines*, 1 Dana, 529; or his cousin: *Hardy v. Sprowle*, 32 Me. 310.

In the following cases there is no such relationship by affinity as will exclude the juror, because he is not related to the wife of a party to the action, nor is his wife related to such party within the degrees which would exclude the juror, but which vary in different states: Where the brother of a juror is the husband of a sister of the defendant: *Chase v. Jennings*, 38 Me. 44; where the juror's sister is the wife of the plaintiff's nephew: *Rank v. Shewey*, 4 Watts, 218; where the juror's sister and niece are wives of two brothers of a party to the action: *Johnson v. Richardson*, 52 Tex. 481; where an uncle of the defendant married an aunt of the juror, and two uncles of the juror married aunts of the defendant: *Bigelow v. Sprague*, 140 Mass. 425, 5 N. E. 144; where the mother of the juror's wife and the mother of the appellee's wife are first

cousins by consanguinity, for though this makes the juror's wife and the appellee's wife related by consanguinity in the sixth degree, or second cousins, it does not relate the juror and appellee by affinity: *Tegarden v. Phillips*, 14 Ind. App. 27, 37, 42 N. E. 549; where a juror's father had married the defendant's brother's widow, the father being dead at the time of the trial: *Cain v. Ingham*, 7 Cow. 478; or where a juror's son married the daughter of the plaintiff: *Waterhouse v. Martin, Peck*, 373, 389.

On a trial for murder, a juror is not disqualified on the ground of affinity with the deceased because the latter and the juror's stepsons are cousins: *Moses v. State*, 11 Humph. 231, 234; or because the juror is a cousin of the stepfather of the deceased, for though he is related by affinity to the mother of the deceased, he bears no relation to the deceased himself: *Kirby v. State*, 89 Ala. 63, 69, 8 South. 110. Neither is a juror disqualified, in a murder trial, on the ground of affinity with the prosecutor, where he is married to the widow of the prosecutor's uncle: *Oneal v. State*, 47 Ga. 229, 248; or because his granduncle married the grandmother of the prosecutor, it appearing that the latter was not a descendant of that marriage: *McDuffie v. State*, 90 Ga. 786. If a juror is disqualified when he is related to the defendant or to the prosecutor "within" the sixth degree, he is disqualified if he is so related "in" the sixth degree: *Hamilton v. State*, 101 Tenn. 417, 47 S. W. 695.

It is said in *Paddock v. Wells*, 2 Barb. Ch. 331, that "relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, where two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity." But this latter statement was mere dictum for there was no such question before the court. The question there before the court was whether or not the vice-chancellor was competent to sit, he being a first cousin of a former husband of the defendant, there being issue living of the first marriage. It has been held, however, that there is an affinity between those who have married sisters so long as the wives are alive: *Foot v. Morgan*, 1 Hill, 654; that a judge and a defendant who have married cousins are related by affinity where such cousins are still living and the parties are united by a subsisting marriage: *New York etc. R. R. Co. v. Schuyler*, 28 How. Pr. 187; and that the husband of an aunt and husband of a niece are related within the fourth degree of affinity: *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288. See, also, the principal case, and compare *Horton v. Howard*, 79 Mich. 642, 19 Am. St. Rep. 198, 44 N. W. 1112, above cited. But, as said above, the better opinion is that relationship by affinity always depends upon the blood of the two spouses, and cannot extend beyond such blood kindred: *Tegarden v. Phillips*, 14 Ind. App. 27, 33, 42 N. E. 549; and it has been held that two persons not otherwise related, who marry cousins: *Blalock v. Waldrup*, 84 Ga. 145, 20 Am. St. Rep.

350, 10 S. E. 622; or sisters: *Deupree v. Deupree*, 45 Ga. 414; are not related by affinity to each other. That a wife is no "relation" to her husband by blood or by affinity, see *Worseley v. Johnson*, 3 Atk. 761; *Esty v. Clark*, 101 Mass. 36, 39, 3 Am. Rep. 320; *Cleaver v. Cleaver*, 39 Wis. 96, 100, 20 Am. Rep. 30; *Keniston v. Adams*, 80 Me. 290, 14 Atl. 203; *Storer v. Wheatley*, 1 Pa. St. 506; and that a stepson is no "relation" of a testator or testatrix, see *Kimball v. Story*, 108 Mass. 382; *Estate of Pfuelb*, 48 Cal. 643.

The degrees of affinity are computed in the same way as those of consanguinity: *Kelly v. Neely*, 12 Ark. 657, 56 Am. Dec. 288, and extended note thereto, showing how degrees of consanguinity and affinity are computed. See, also, *Hume v. Commercial Bank*, 10 Lea, 1, 43 Am. Rep. 290. In reckoning the degrees, we must proceed from a single, definite propositus. In consanguinity it is a simple, definite person; while in affinity it is a single, definite marriage; and relationship by affinity extends only through one marriage. The two lines of blood meet in the husband and wife. One line of affinity extends from the husband to the wife's blood kindred, and the other line extends from the wife to the husband's blood kindred: *Tegarden v. Phillips*, 14 Ind. App. 27, 33, 42 N. E. 549, per Lotz, J. Relationship by affinity terminates on the death of the person by whose marriage it was created: *Note to Commonwealth v. Brown*, 9 Am. St. Rep. 755; *Miller v. State*, 97 Ga. 653, 657, 25 S. E. 366; *Paddock v. Wells*, 2 Barb. Ch. 331; *Blodget v. Brinsmaid*, 9 Vt. 27, 30; unless the marriage has resulted in issue, who are still living, in which case the relationship by affinity continues: *Note to Commonwealth v. Brown*, 9 Am. St. Rep. 755; *Paddock v. Wells*, 2 Barb. Ch. 331; *Miller v. State*, 97 Ga. 653, 25 S. E. 566. But in *Winchester v. Hinsdale*, 12 Conn. 88, 93, it is said that "the circumstance that children of the marriage survive does not, in our opinion, operate to continue the affinity"; and in *Spear v. Robinson*, 29 Me. 531, 545, it is said that "the dissolution of a marriage, once lawful, by death or divorce, has no effect upon the issue, and, it is apprehended, it can have no greater operation to annul the relation by affinity which it produced."

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

DONOVAN v. CONSOLIDATED COAL COMPANY OF ST.
LOUIS.

[187 Ill. 28, 58 N. E. 290.]

TRESPASS—MINING COAL—SELLING RIGHT ON ANOTHER'S LAND.—One who knowingly authorizes a company to mine for the coal of a third person, and the company takes it and pays him therefor, is liable as a trespasser, though he did not participate in mining the coal otherwise than by making the contract under which it was dug.

TRESPASS—VALUE OF PROPERTY INCREASED BY—DAMAGES.—Although the value of coal may be increased by mining and removing it to the surface by the labor of the wrongdoer, the owner is entitled to its full value in its severed condition, and the trespasser can take no advantage for his labor, notwithstanding such mining was done by mistake or inadvertence.

Dill & Wilderman and George C. Rebhan, for the appellant.

Charles W. Thomas, for the appellee.

28 CARTWRIGHT, J. Appellant owned a tract of twenty-four and a half acres of land in St. Clair county, in which was a coal mine known as the "Johnson mine." He also owned the surface of an adjoining tract on the west, containing one hundred and thirty-five acres, but appellee owned the coal under said surface, which had been conveyed to it before appellant obtained his title to the surface. On October 1, 1896, appellant entered into a written contract with the St. Louis and O'Fallon Coal Company, Edward L. Thomas, and John T. Taylor, by which he leased to them, for the term of five years from said date, the Johnson ²⁹ mine, with one acre of ground around the shaft and the machinery and appurte-

nances, and also granted to them the right to mine and remove the coal underlying said lands, including the coal of appellee, to which he did not have or claim any title, and they agreed to pay him a certain price per ton for all the coal so mined. Under this contract the St. Louis and O'Fallon Coal Company went into possession of the mine, and on November 30, 1896, sublet said mine to Thomas Davis and others, with the right to mine and remove said coal during said term, for which coal the St. Louis and O'Fallon Coal Company was to pay certain prices per ton stipulated in the contract. Under these arrangements, and by virtue of the right which appellant assumed to grant, over five thousand tons of coal owned by appellee under the one hundred and thirty-five acres were mined and removed. Appellant was paid the price specified in his contract per ton for said coal. Appellee brought this action of trespass in the circuit court of St. Clair county against appellant and the parties who mined and removed the coal, to recover damages occasioned by such mining and removal of its coal. The defendants pleaded the general issue, and a jury being waived there was a trial by the court. There was a nonsuit as to all the defendants except the appellant, and there was a finding and judgment against him for two thousand five hundred dollars and costs. On appeal to the appellate court the judgment was affirmed.

The court held as law a proposition submitted by the plaintiff, that if the plaintiff was the owner of the coal and the defendant Donovan made the contract authorizing and empowering the St. Louis and O'Fallon Coal Company, Edward L. Thomas, and John T. Taylor to enter upon said coal and dig and carry the same away in consideration of the price per ton to be paid said defendant, and said lessees made some arrangements with other parties under which they dug the coal and defendant received said price per ton, he was guilty of the trespass. ³⁰ The court refused to hold that if the defendant Donovan did not participate in mining the coal otherwise than by making the contract under which it was dug and mined, then he was not liable for the trespasses. The action of the court on these propositions is assigned as error, on the ground that the contract of the defendant Donovan did not create any such relation between him and the other parties, or give him any such control over them, as to make him liable for their trespasses. There are cases where a liability may arise out of the relation of the parties, as, a master may

become liable for the act of a servant, or a principal for that of his agent, although not authorized by him. But questions of that kind are immaterial in this case. It was not sought to hold Donovan liable for some act not authorized by him, but the trespass for which the suit was brought was the identical thing authorized by him. He undertook, without the consent of the plaintiff, to dispose of its coal, and the question is not the same as whether he would have been responsible for a trespass upon adjoining property not mentioned in his contract. Donovan authorized the other parties to commit the trespass in part for his benefit. He authorized them to take plaintiff's coal, and they took it and paid him a stipulated price per ton, and, as he authorized and directed the trespass, he is bound to answer to the plaintiff.

The coal was worth on the cars at the mouth of the pit sixty-five cents a ton, and the cost of bringing it from where it was mined and putting it on the cars was thirteen cents a ton. On the measure of damages the court held as correct the proposition of law submitted by plaintiff, that such measure of damages was the full value of the coal at the mouth of the pit, less the cost of transporting it from the place where it was dug to the mouth of the pit, and, if it was loaded upon railroad cars, the measure of damages was its value after it was so loaded, less the cost of transporting it from the place where it ³¹ was dug and loading it upon the cars. It is argued that the measure of damages stated in these propositions is not applicable to the case, because the defendant was not a willful trespasser, and that, in such case, the measure of damages should be the value of the coal as it was in the bank or earth before it was mined. Defendant testified that he had never been in the possession of the coal owned by appellee and never claimed title to it; that he knew it was owned by the plaintiff; that he had a large plat upon the wall in his office, and in making the contract failed to remember that the coal had been sold to plaintiff, and that he could give no other explanation of his contract and never intended to dispose of plaintiff's coal. The rule contended for was given in *Robertson v. Jones*, 71 Ill. 405, but this court reversed the judgment because of giving it, and laid down the rule stated in the proposition in this case. Afterward, in the case of *Illinois etc. Coal Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342, this question of the measure of damages was fully considered. In that case the trial court instructed the jury that if the defendant, by its ser-

vants and employés, mined coal from the plaintiff's land without his consent, as alleged in his declaration, and did so by mistake or inadvertence, without knowledge that the coal was being mined from the plaintiff's land, the jury were bound to allow plaintiff the value of the coal at the pit mouth, less the cost of carrying it from the place where it was dug, allowing defendant nothing for the digging. The instruction was held to be correct, and the court, upon a review of authorities, said: "No necessity exists for one miner to trespass upon an adjoining owner. If proper maps and plans of the mine are kept and measurements and surveys of the work made, as required by common prudence and the statute, each miner will have no difficulty in confining his operations to his own estate. When, therefore, one miner, in disregard of his duty, invades the property of another, he should not be permitted to ³² profit by his unlawful act, which would be the case if the trespasser was only required to pay the value of the coal as it existed in the mine before it was taken." In *Illinois etc. Coal Co. v. Ogle*, 92 Ill. 353, the court declined to change the rule adopted, and expressed the belief that it rested on sound legal principles and was suggested by a wise and just policy.

Although the value of coal may be increased by mining it and removing it to the surface by the labor of the wrongdoer, the owner is entitled to its full value in its severed condition, and the trespasser can take no advantage of his labor. There was no disputed title to the coal, and the defendant Donovan did not grant the right to mine and carry it away under a bona fide belief that he had a right to do so. His act in granting the right to mine it and take it away was not the result of an innocent mistake, but of his own negligence. The measure of damages stated in the proposition was correct: *Hilliard on Torts*, 419; 1 *Addison on Torts*, par. 458.

The judgment of the appellate court is affirmed.

TRESPASS FOR MINING COAL.—The measure of damages in an action of trespass for taking coal from a mine is the value of the coal at the mouth of the pit, less the cost of carrying it there, and the defendant is entitled to nothing for the digging: *Illinois etc. Coal Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342.

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DORMAN v. DORMAN.

[187 Ill. 154, 58 N. E. 235.]

TRUSTS—RESULTING—PAYMENT OF CONSIDERATION.

As between strangers, a resulting trust arises where the purchase money is paid by one person and the title to the property is taken in the name of another.

TRUSTS—CONSIDERATION PAID BY HUSBAND—ADVANCEMENT.—Where the purchase price of real property is paid by a husband, and the legal title is taken in the name of his wife, a resulting trust does not ordinarily arise, the presumption being that the conveyance was intended as an advancement; but such presumption may be rebutted by clear and satisfactory evidence.

TRUST—PROPERTY TAKEN IN WIFE'S NAME—ADVANCEMENT—EVIDENCE TO REBUT.—If a husband purchases land in his wife's name, the presumption of an advancement is sufficiently rebutted by facts which show that he took possession of the land, improved it, paid the taxes thereon, and occupied it with his wife as a homestead; that such property constituted the bulk of his estate, and the wife admitted that she held the property in trust for him.

TRUST—RESULTING.—LACHES cannot be imputed to one who seeks to enforce a resulting trust in real property, where his right to use and possess the same has never been questioned, since his possession is notice to the world of all his rights.

TRUST—ENFORCING—PLEADING DEFENSES.—In equity a defendant is bound to apprise the complainant of the nature of his defense, and cannot avail himself of matters of defense appearing from the evidence but not set up in the answer. Hence where a husband seeks to enforce a resulting trust in land taken in the name of his wife, the question whether the title was so taken to defraud his creditors cannot be considered unless the answer contained such allegations.

Bill in equity for the partition of land. The bill alleged that Mary A. Dorman was the owner of the land; that she died in 1878, leaving her husband and three children, one of whom, Benjamin R. Dorman, conveyed a portion of his interest in the premises to one Ranes; that R. I. Smith had a judgment against Benjamin R. Dorman, and C. B. Klinefelter was a tenant on the land. The prayer was for an assignment of dower and the partition of the land. Martin L. Dorman and two children answered, denying that Mary A. Dorman in her lifetime was the owner of the land, and averred that she held it in trust for her husband, Martin L. Dorman. The husband filed a cross-bill alleging that he purchased the property and took the title in the name of his wife, who held it in trust for him. The court dismissed the original bill and sustained the cross-bill, and decreed that Martin L. Dorman was the equitable owner; that he be invested with the legal title and that the

deed from Benjamin R. Dorman to Ranes be canceled as a cloud upon his title.

John E. Hogan, for the appellants.

Charles H. Shamel and John B. Colegrove, for the appellees.

158 HAND, J. The evidence in this case clearly establishes that Martin L. Dorman purchased the land in the year 1873 from A. J. Willey; that he paid the consideration therefor, but at the time the deed was made the title thereto, at his request, was conveyed to Mary A. Dorman, his wife. A resulting trust arises, by implication of law, from the acts of the parties: 1 Perry on Trusts, sec. 134; Donlin v. Bradley, 119 Ill. 412, 10 N. E. 11; Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383. When the evidence shows the payment of the purchase money by one and the conveyance of the title thereby purchased to another, between parties who are strangers to each other, the law so construes these two facts as to make them constitute a resulting trust: Smith v. Smith, 85 Ill. 189; Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383. If the legal title is taken in the name of the wife such implication **159** does not arise, it being the presumption that the same was intended as an advancement: Smith v. Smith, 144 Ill. 299, 33 N. E. 35. Such presumption may, however, be rebutted by parol testimony, if the same is clear and satisfactory. Thus, it is said in Perry on Trusts, section 147: "Whether a purchase in the name of a wife or child is an advancement or not is a question of pure intention, though presumed, in the first instance, to be a provision and settlement; therefore, any antecedent or contemporaneous acts or facts may be received either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose." The rule thus announced has been fully recognized by this court in numerous cases: Taylor v. Taylor, 4 Gilm. 303; Adlard v. Adlard, 65 Ill. 212; Wormley v. Wormley, 98 Ill. 544; Johnston v. Johnston, 138 Ill. 385, 27 N. E. 930; Smith v. Smith, 144 Ill. 299, 33 N. E. 35; Goelz v. Goelz, 157 Ill. 33, 41 N. E. 756; Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383; Pool v. Phillips, 167 Ill. 432, 47 N. E. 758.

The controlling question in this case is, Did Martin L. Dorman, at the time he caused the title to this land to be placed in his wife, intend to make an absolute gift of the property

to her, or was it his purpose that she should simply hold the title for him? The presumption is he intended the same as an absolute gift. The burden of proof is upon him to overcome such presumption.

We have examined the record in this case with much care, and are fully convinced that Martin L. Dorman never intended to give this property to his wife, but that he took the title in her name with the understanding and expectation that she would reconvey the same to him on request. It clearly appears from competent and credible evidence that Martin L. Dorman took possession of the property almost immediately after the purchase; that he made permanent and lasting improvements, paid the taxes, and after a time occupied it with his family as a home; that he at all times controlled and managed it as ¹⁶⁰ his own, and that his wife recognized his right so to do, and at least on one occasion stated that the land was deeded to her in trust and that she intended to deed it back to her husband; that this property constituted the principal part of his entire estate, and that he had a family of small children dependent upon him for support. The facts that the husband may have taken possession of the land, improved it, paid the taxes thereon, and occupied it with his wife as a homestead would not be sufficient, alone, to overcome the presumption of a gift, for the reason there is nothing in these facts inconsistent with the theory of an advancement; still, we think these facts, taken in connection with the admission of the wife that she held this property in trust for the benefit of her husband, and the further fact that this property, at the time of the conveyance, constituted the bulk of his estate, sufficient to rebut the presumption of an advancement.

Martin L. Dorman had been in possession of the property from the time of the purchase thereof, and his right to use and possess the same seems never to have been called in question until a short time before the filing of the original bill. His possession was notice to the world of all his rights, and laches cannot be imputed to him: *Wormley v. Wormley*, 98 Ill. 544; *McNamara v. Garrity*, 106 Ill. 384.

It is contended by appellants that a court of equity is powerless to grant relief in cases of this character. This court has heretofore, in a number of cases where the facts are substantially as here established, granted relief similar to that prayed for in the cross-bill herein: *Adlard v. Adlard*, 65 Ill.

212; Wormley v. Wormley, 98 Ill. 544; Stone v. Wood, 85 Ill. 603; Pool v. Phillips, 167 Ill. 432, 47 N. E. 758.

It is further contended by counsel for appellants that Martin L. Dorman caused the property to be conveyed to his wife to hinder or defraud or delay his creditors. It is undoubtedly the law that where a conveyance has been made for such purpose equity will not interpose to ¹⁶¹ restore to the grantor or his heirs the title to the property so fraudulently conveyed: Dunaway v. Robertson, 95 Ill. 419; Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; McElroy v. Hiner, 133 Ill. 156, 24 N. E. 435. But no such issue is made by the pleadings in this case, and that question is not before us. Martin L. Dorman charged in his cross-bill that the property was purchased with his money, and that Mary A. Dorman, at the time of her death, held the same in trust for his benefit. There is no allegation in the answer to the cross-bill that the title to this property was conveyed to Mary A. Dorman for the purpose of hindering or delaying or defrauding the creditors of Martin L. Dorman. This court held in Crone v. Crone, 180 Ill. 599, 54 N. E. 605, which was a bill to enforce a resulting trust, that a defendant in chancery is bound to apprise the complainant of the nature of his defense, and cannot avail himself of matters of defense appearing from the evidence but not set up in the answer, and refused to consider the question whether or not the property had been conveyed to defraud creditors as the answer contained no such allegation, although the evidence tended to show that fact.

We do not deem the question of the competency of Martin L. Dorman as a witness in his own behalf of any importance. The court seems to have limited his testimony to transactions which took place after the death of his wife. As the trial was before the court, and there is ample evidence in the record to sustain the decree without the consideration of his testimony, we will presume the trial court considered only such testimony as was competent and disregarded such as was incompetent.

The decree of the circuit court will be affirmed.

AN ADVANCEMENT TO A WIFE will be presumed where her husband pays for an estate and directs a conveyance of it to be made to her: Spring v. Hite, 22 Me. 408, 39 Am. Dec. 587. A purchase by a husband in the name of his wife is presumed to be an advancement to her: See the monographic note to Neill v. Keese, 51 Am. Dec. 754, 755.

A RESULTING TRUST DOES NOT ARISE in favor of a person who furnishes money to purchase property, the conveyance of which is taken in the name of another, if there is an obligation on the part of the former to provide for the latter, as where the parties are wife or child of the person whose funds have been so employed. The presumption that under such circumstances no trust was intended is one of fact, and may be rebutted by evidence of circumstances tending to show the existence of a trust: *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837, 23 S. E. 721.

BRADLEY v. DRONE.

[187 Ill. 175, 58 N. E. 304.]

COLLATERAL ATTACK—PROBATE SALE—DEEDS OF ADMINISTRATOR.—A bill which seeks for the removal of administrator's deeds as clouds upon the complainant's title is a collateral attack upon the proceedings of the court under which the sale was had.

COUNTY COURTS — JURISDICTION — PRESUMPTION.—County courts in Illinois are courts of general jurisdiction, in favor of whose jurisdiction every presumption will be indulged.

COLLATERAL ATTACK—PROBATE SALE.—MERE IRREGULARITIES in the proceedings of a county court with reference to an administrator's sale are not grounds for a collateral attack.

COLLATERAL ATTACK — JURISDICTION — PRESUMPTION FROM RECITALS IN DECREE.—Where a decree recites that the defendants were duly served with process or by publication as the law requires, and the court finds that it had jurisdiction of the parties and the subject matter, it will be presumed in a collateral attack, even if the summons in the record was void, that another and proper summons was issued and served, and that proper publication notice was had and a correct certificate of mailing of notice and of publication was before the court.

Bill in chancery to partition real estate, and to remove as clouds upon the title the deeds of defendants in error acquired by virtue of an administrator's sale of lands.

Jesse E. Bartley, George W. Pillow, and Carl Roedel, for the plaintiffs in error.

W. S. Phillips and C. S. Conger, for the defendants in error.

178 WILKIN, J. As a basis for asking the removal of the administrator's deeds as clouds upon the title of plaintiffs in error, it is urged that the proceedings in the county court under which the real estate in question was sold were wholly without jurisdiction, and void. This is clearly a collateral attack upon the proceedings of the county court. In *Moore v.*

Neil, 39 Ill. 256, 89 Am. Dec. 303 (a similar case then before this court), it was held that such a proceeding as this, where the defendant's title derived from the administrator's sale is sought to be divested, is as purely collateral as an action of ejectment: *Swearengen v. Gulick*, 67 Ill. 208; *Harris v. Lester*, 80 Ill. 307; *Spring v. Kane*, 86 Ill. 580; *Matthews v. Hoff*, 113 Ill. 90; *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304. Being a collateral attack upon the county court proceedings, the rule is, that nothing is presumed to be out of its ¹⁷⁹ jurisdiction but that which specially appears to be so. In *Matthews v. Hoff*, 113 Ill. 90, 96, where the jurisdiction of the county court was attacked collaterally, we said: "Every presumption will be indulged in favor of the jurisdiction of a court of general jurisdiction, and county courts in this state are courts of general jurisdiction with respect to all matters coming within the purview of their jurisdiction as given by law": See, also, *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304, and cases cited.

The petition of counsel for plaintiffs in error is, that the record of the proceedings of the county court upon its face shows an absence of jurisdiction, because, it is said, the petition filed by the administrator, asking for an order to sell real estate to pay debts, fails to allege the necessary facts with reference to amount of claims allowed, the estate on hand and the manner of disposing of the same, and the amount of claims paid. While we are satisfied the petition is a substantial compliance with the requirements of the statute, the objections pointed out, if well founded, are at most but mere irregularities, and are not open to review in this collateral proceeding. There may be errors in the proceedings to sell land which might, on direct appeal, lead to a reversal of the order; but where, as here, the proceeding to sell is attacked collaterally, as is held in the case last above cited, it cannot be defeated or impeached for mere errors.

It is next contended the summons issued on the day the petition was filed, and being made returnable to the November term following, was void because the October term of the county court intervened, it being insisted that the petition should have been addressed to the first term thereafter (the October term) and the summons made returnable to that term. The decree which was rendered at the December term following, as shown by the foregoing statement, recites that "all of the defendants have been duly served with process or by publica-

tion in a newspaper, as the law requires, more than the lawful ¹⁸⁰ time prior to sitting of the court, and the court doth find that this court has jurisdiction both of the parties defendant and complainant, and the subject matter of the suit," etc. Even conceding the summons of September 19th void for the reasons urged, yet from the finding that due service by summons was had upon the defendants it will be presumed, in a collateral attack, that another and proper summons was issued and served. "All reasonable presumptions are in favor of the jurisdiction of the court, and the law will presume, prima facie at least, from the finding of the court that such was the fact; that such summons, with the proper return on it, was before the court and may have been abstracted or lost from the files": *Matthews v. Hoff*, 113 Ill. 90, and cases cited.

It is also said the publication notice to nonresident Mary E. Evans was based upon the void summons of September 19th, and no presumption that a proper publication was had can be indulged because there was not sufficient time for such notice. As in the case of personal service of summons, it will be presumed from the recitals of the decree as to the jurisdiction that, in ample time before the decree was rendered, proper publication notice was had and a correct certificate of mailing of notice and of publication was before the court. The defective certificate of publication and mailing, which appears in the record, is not the only evidence of that fact, and we must presume that other evidence was offered as a basis for the finding of the court: *Barnett v. Wolf*, 70 Ill. 76; *Harris v. Lester*, 80 Ill. 307.

It being established that the bill of complainants must be treated and considered as an attempt to collaterally attack the proceeding by the administrator and his deeds to the several purchasers, and that the county court had jurisdiction both of the subject matter and the persons of the heirs of the intestate, all other alleged errors are unavailing as grounds for declaring void and setting aside that proceeding and the conveyances thereunder. The ¹⁸¹ failure to set off the homestead of the infant, and the other errors urged, are at most but mere irregularities intervening in the county court and upon the administrator's sale, and, as we have shown above, cannot be availed of in a collateral attack. We deem it unnecessary, therefore, to give further attention to them.

The decree of the circuit court dismissing the bill will be affirmed.

Mr. Chief Justice Boggs, having heard this cause in the circuit court, took no part in the decision here.

COLLATERAL ATTACK upon judgments is discussed in the monographic notes to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119; *Hahn v. Kelly*, 94 Am. Dec. 762-770. As against a collateral attack on the ground that the summons was insufficient, it must be presumed in favor of the judgment that another and sufficient summons was issued and served; *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525. If the petition of an administrator for the sale of his decedent's lands is sufficient to give the court jurisdiction to decree their sale, such decree and a sale thereunder are valid as against collateral attack, notwithstanding irregularities in the supervening proceedings; *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100, 20 South. 994.

KNEFEL v. PEOPLE.

[187 Ill. 212, 58 N. E. 388.]

JUDGMENTS—NUNC PRO TUNC.—THE POWER IS INHERENT in courts of law and equity to make entries of judgments or decrees nunc pro tunc in proper cases and in furtherance of the interests of justice.

JUDGMENTS—AMENDING—NUNC PRO TUNC—SUBSEQUENT TERM.—A court may, upon notice to parties in interest, by an order entered nunc pro tunc, amend or correct a judgment after the term at which it was rendered, when, by reason of a clerical misprision, it does not speak the truth.

JUDGMENTS—AMENDING—CRIMINAL RECORD.—A clerical error in the record of a criminal case, showing that the motion for a new trial was overruled when in fact it was allowed, may be corrected at a term subsequent to the term when the same is made, where the accused after a nolle prosequi seeks to use the record in his favor upon a second indictment for the same offense.

JUDGMENTS—AMENDING—USE OF CLERK'S MINUTES. Where a court has power to correct the record of a criminal case it is competent for it to examine the minute-book, journal, and docket of the clerk of the criminal court, and hear the evidence of witnesses explanatory of the method in which the same were kept and the record written up therefrom.

The plaintiff in error was indicted for larceny, and entered a plea of not guilty. Upon the trial he was convicted. He made a motion for a new trial, and the court entered an order overruling the motion, when in fact the motion was granted. Later upon motion of the state's attorney an order of nolle prosequi of the indictment was entered. The plaintiff was re-indicted for the same offense, and at the trial sought to introduce in evidence the record of the former case. The prosecu-

tion objected, on the ground that it did not speak the truth, and moved to amend the record so as to show that the motion for a new trial had been allowed. The court allowed the motion, and ordered that the record be amended *nunc pro tunc*.

David, Smulski & McGaffey, for the plaintiff in error.

E. C. Akin, attorney general, Charles S. Deneen, state's attorney, and A. C. Barnes, for the people.

214 HAND, J. This is a writ of error sued out of this court to the criminal court of Cook county, for the purpose of reviewing the action of that court in the case of *People of State of Illinois v. Paul F. Knefel*, No. 46,575, in entering an order in said cause on the twenty-ninth day of September, 1899, amending the record in said cause *nunc pro tunc* as of **215** May 22, 1897, so as to make the same show that the order entered in said cause on said last-named day for a new trial was sustained and not overruled.

"The power of courts, whether of law or equity, to make entries of judgment or decrees *nunc pro tunc* in proper cases and in furtherance of the interests of justice, is one which has been recognized and exercised from ancient times and as a part of their common-law jurisdiction. This power, therefore, does not depend upon statute—it is inherent. It rests partly upon the right and duty of the courts to do entire justice to every suitor, and partly upon their control over their own records and authority to make them speak the truth": 1 Black on Judgments, sec. 126.

The law is well settled that a court is powerless to amend its final judgment and thereby correct judicial errors after the term at which it was rendered. It may, however, thereafter, upon notice to parties in interest, by order entered *nunc pro tunc*, amend or correct such judgment, when, by reason of a clerical misprision, it does not speak the truth: *Freeman on Judgments*, c. 4; *Church v. English*, 81 Ill. 442; *Becker v. Sauter*, 89 Ill. 596; *Tucker v. Hamilton*, 108 Ill. 464.

The plaintiff in error contends that under the law of this state no power exists in a criminal case to amend the record for a misprision of the clerk of the court except during the term of the court at which the same is made. We cannot accede to this proposition. In the case of *Kennedy v. People*, 44 Ill. 283, the clerk, in writing the record showing the return of the indictment into court, made a mistake in the title of

the offense with which the defendant was charged. The court say: "If such a mistake was made, the court below has the power to permit the record to be amended upon a proper application by the people." In *Phillips v. People*, 88 Ill. 160, the record showed a plea of not guilty, when, as a matter of fact, no such plea had been entered. A trial and conviction ²¹⁶ upon such record were had and the judgment was set aside because of the want, as a matter of fact, of such plea. The court below, on motion of the state's attorney, at a subsequent term ordered the record amended by striking out the plea of not guilty. In *Gore v. People*, 162 Ill. 259, 44 N. E. 500, a similar motion was granted and an amendment nunc pro tunc allowed in the court below at a subsequent term after the return of the indictment and after the suggestion of a diminution of the record in this court. These cases clearly establish that a clerical error in the record may be corrected at a term subsequent to the term when the same is made, in a criminal case.

It is next insisted that even though the court has power to allow the record to be amended or corrected, such correction cannot be made after the term from the memoranda of the court's orders made in the clerk's minutes at the time. That such correction may be made after the expiration of the term already appears by the decisions heretofore referred to. The language used by the court in these cases seems sufficiently general to include memoranda of the transactions or minutes of the clerk made at the time, under the direction and in the presence of the court. In the case of *Gore v. People*, 162 Ill. 259, 44 N. E. 500, the court say: "The record may also be amended whenever there is any memorandum or record by which to amend." In *May v. People*, 92 Ill. 343, this court, in approving of the amendment, quoted from 1 Bishop on Criminal Procedure, section 1160, which reads: "Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly transpired at the preceding term. But this refers to the power of the clerk proceeding of his own motion. The court may order nunc pro tunc entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited and not easily defined. In general, mere clerical errors may be amended in this way." In *Church v. English*, 81 Ill. 442, the court said: "Whether ²¹⁷ it is a misprision of the clerk or a malfeasance, the court has power at all times, upon no-

tice given, to reform its records so as to make them speak the truth. . . . No reason suggests itself why such amendments may not be made at any time, so long as anything definite and certain remains to amend by." It was therefore competent for the court to examine the minute-book, journal and docket of the clerk of the criminal court, and hear the evidence of witnesses explanatory of the method in which the same were kept and the record written up therefrom, in passing upon the motion to correct the order of May 22, 1897.

It is next insisted by plaintiff in error that the court had no power to correct said record after a *nolle prosequi*. We do not see how such order in any way limited the power of the court to make its record speak the truth. The plaintiff in error sought to make use, in the case on trial, of the record of a prior proceeding in said court as evidence in his favor. It was then brought to the attention of the court that such record did not speak the truth by reason of the clerical error or misprision of the clerk. It was manifestly proper for the court to amend its record by correcting the clerical error or misprision of the clerk complained of, so as to state the proceedings had before that time in said cause truthfully, even though the case had been *nollied*. The plaintiff in error and his attorney were present in court at the time the motion was made and the amendment allowed, participated in the argument, and cross-examined the witnesses produced on the hearing thereof, and plaintiff in error is bound by the action of the court thereon.

We find no substantial error in this record. The judgment of the criminal court of Cook county is therefore affirmed.

JUDGMENT—NUNC PRO TUNC ENTRY.—From the earliest times courts have possessed and exercised the power to make entries of judgments *nunc pro tunc*. And this power may be exercised in criminal as well as civil cases: See the monographic note to *Ninde v. Clark*, 4 Am. St. Rep. 828. As to what evidence courts may resort to in making such entries, see *Missouri etc. Ry. Co. v. Holschlag*, 144 Mo. 253, 66 Am. St. Rep. 417, 45 S. W. 1101; *Jacks v. Adamson*, 56 Ohio St. 397, 60 Am. St. Rep. 749, 47 N. E. 48; monographic note to *Ninde v. Clark*, 4 Am. St. Rep. 831-833.

AMENDMENT OF RECORD.—THE POWER OF A COURT to amend its records to make them correspond with the facts may be exercised at any time: *Kaufman v. Shain*, 111 Cal. 16, 52 Am. St. Rep. 129, 43 Pac. 393. Courts of record, in criminal as well as in civil cases, may correct clerical errors existing in the record of a previous term: *In re Black*, 52 Kan. 64, 39 Am. St. Rep. 331, 34 Pac. 414.

BRAUN v. HESS.

[187 Ill. 283, 58 N. E. 371.]

INTEREST—CONTRACT TO PAY.—INVOICES which are sent with each shipment of goods and received by the buyer without objection, and which contain the words "Bills bear interest after maturity. Terms sixty days," constitute a contract to pay interest.

AGENCY—GENERAL—IMPLIED POWER.—A CONTRACT of guaranty against loss signed by a person as "general agent" is the individual obligation of the signer, and does not bind the principal in the absence of evidence showing that the agent had such authority.

A **GENERAL AGENT** of a corporation handling cigarettes and tobacco has no implied power, as a matter of law, to bind the corporation by a contract guaranteeing a purchaser against loss of rebates from another corporation on account of his handling such goods.

CUSTOM—EVIDENCE OF—CONTRACT FOR REBATES.—It is not error to refuse to allow proof of a custom among agents of cigarette manufacturers to make contracts for rebates, where the purchaser does not rely upon such custom but upon the statement of the agent that he had obtained authority from his principal to make such contract.

Ashcraft & Gordon and R. M. Ashcraft, for the appellants.

Darrow, Thomas & Thompson and Morris St. P. Thomas, for the appellee.

²⁸³ **HAND, J.** This is an action of assumpsit, brought by appellee, a corporation doing business in Rochester, New York, to recover a balance claimed to be due it on an open account for cigarettes and tobacco sold and delivered to ²⁸⁴ William H. Heegaard, of whose will the appellants are executors. The declaration contains the common counts only, and the pleas are the general issue and setoff. The first trial resulted in a verdict and judgment against appellee for \$286.86, which, on appeal to the appellate court, was reversed and the cause remanded: *Braun v. Hess*, 54 Ill. App. 227. On the second trial the court instructed the jury to find the issues for the plaintiff and to assess the plaintiff's damages at the sum of \$903.08, with interest thereon at the rate of five per cent per annum from October 26, 1890, to the day of trial, which resulted in a verdict and judgment in favor of appellee for the sum of \$1,260.49. This judgment was affirmed by the branch appellate court for the first district, and the present appeal is prosecuted from such judgment of affirmance.

It is first contended by appellants that the court erred in peremptorily instructing the jury to find for the plaintiff. As we understand the evidence of Mr. Heegaard, as abstracted, the

goods sued for by appellee had all been received by him; that the purchase price thereof was \$914.03, from which should be deducted \$10.95 freight paid by him, which left \$903.08 due the plaintiff. We think it can fairly be said from the evidence there was no dispute as to the amount of appellee's claim.

It is further contended the court erred in instructing the jury to allow appellee interest on its claim from October 26, 1890, to the date of trial. At the head of each invoice sent by appellee to Heegaard at the time the goods were shipped, appear the following: "Bills bear interest after maturity, and are subject to sight draft"; also the words, "Terms sixty days, two per cent discount for cash within ten days." The date of the last bill was August 26, 1890. The goods were shipped by appellee and received by Heegaard upon the terms stated in the invoices, which constituted, under the circumstances, a contract to pay interest. The case of *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022, which was an action to recover ²⁸⁵ the price of goods sold, is an authority directly in point. The court, on page 522, say: "It appeared that the plaintiff was accustomed, when it sent the goods, to send a bill of them, on the face of which were the words, 'terms thirty days.' The judge instructed the jury as follows: 'Now, if all those bills for these goods were in this form, terms stated at thirty days, and the party took the goods with that upon it and made no objection to that in any way, it would be an implied agreement that that was the time within which the goods were to be paid for, and that, if they were not paid for, after that time interest would begin to run by way of damages from the expiration of thirty days.' There is no evidence of any express agreement in regard to the time when the goods should be paid for nor in regard to the time when interest should begin to run. We are of the opinion that the instruction was correct. In the absence of any agreement, the price of the goods would be payable on delivery. The parties could make any agreement about it that they chose to make. If the plaintiff notified the defendant that it was willing to give him a credit of thirty days on each bill and that the price would be payable at the expiration of that time, it was a proposition in the defendant's favor, and if he made no objection his assent would be implied, and he would be bound by the contract."

We think that the court did not err in instructing the jury to find for appellee, unless the defense set up in the plea of *setoff* was sustained.

The plea of setoff filed by defendant alleged that, before plaintiff's cause of action accrued, defendant was purchasing cigarettes from the American Tobacco Company, and was receiving a rebate thereon of thirty cents a thousand in consideration that defendant would not sell cigarettes manufactured by any other person; that in consideration that defendant would purchase of plaintiff certain cigarettes manufactured and sold by plaintiff, known as "Creoles" and "Diadems," plaintiff promised ²⁸⁶ the defendant to indemnify and save him harmless against and from any loss of rebates from the American Tobacco Company on account of handling plaintiff's cigarettes; that defendant, relying upon such promise, and upon the sole consideration thereof, bought of plaintiff a large number of cigarettes and paid plaintiff large sums of money therefor; that defendant also bought from said American Tobacco Company a large number of its cigarettes and paid it large sums of money therefor, and by reason of making the aforesaid promises with the plaintiff, and by reason of selling and handling the plaintiff's cigarettes, defendant lost large sums of money from the American Tobacco Company, to wit, the sum of thirty cents per thousand on all the cigarettes of the American Tobacco Company, sold by defendant, which sums the plaintiff refused to pay to defendant, etc., to the damage of the defendant of \$1,500, etc. To sustain the defense set up in said plea the defendant introduced in evidence the following memoranda or agreements:

"51 Wabash Ave., Chicago, Ill., May 26, 1890.

"Mess. W. H. Heegaard & Co., City.

"Gentlemen: We will guarantee you from any loss of rebates from the American Tobacco Co. on account of handling Creole and Diadem cigarettes. Yours truly,

"J. E. AVERY,

"Gen'l Agt. S. F. Hess & Co."

"Chicago, May 28, 1890.

"Mess. W. H. Heegaard & Co., City.

"Gentlemen: We, in consideration of your handling our cigarettes, guarantee that you will receive the rebate of 30c pr. M on all cigarettes you handle manufactured by the Amer. Tob. Co. or its branches, from April 1, 1890, until April 1, 1891.

Yours truly,

"J. E. AVERY,

"Gen'l Agt. S. F. Hess & Co., Rochester, N. Y."

The controlling question in this case is, Did the evidence show that J. E. Avery had authority to execute said memoranda or agreements, and thereby bind appellee? The law is well settled in this state (*Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175; *McNeil v. Shober etc. Lithographing Co.*, 144 Ill. 238, 33 N. E. 31; *Frankland v. Johnson*, 147 Ill. 520, 37 Am. St. Rep. 234, 35 N. E. 480), that these agreements on their face are the individual obligations of J. E. Avery, and not of appellee. The words, "Gen'l Agt. S. F. Hess & Co.," following the signature of J. E. Avery, are mere descriptio personae. The burden of proof was upon the defense to show authority on the part of Avery to execute said memoranda or agreements. There is no pretense that any proof whatever was offered of express authority from the appellee to Avery to execute the particular memoranda or agreements offered in evidence. There was, therefore, an entire absence of proof of such authority, unless it can be said that the proof shows that J. E. Avery was the general agent of the appellee, and therefore had implied authority to bind appellee by such memoranda or agreements. Conceding such general agency was established, such authority, in our judgment, is not implied as a matter of law. The appellee having made a clear case, and the defense having failed for want of proof tending to establish a fact material and necessary thereto, the instruction directing a verdict for the appellee was proper.

The case of *Kinser v. Calumet Fire Clay Co.*, 165 Ill. 505, 46 N. E. 372, is upon the facts very much like the case at bar, and, we think, decisive thereof. On page 508 we say: "It is clear that the evidence introduced on behalf of the plaintiff entitled it to the judgment rendered, unless the defense set up in the plea of setoff was sustained. It is not claimed that any proof whatever was offered of express authority from the plaintiff to Hartford to enter into a contract like that set up in the plea. There was therefore an entire absence of proof of such authority, unless it can be said that, being the agent of the company to sell its sewer-pipe, authority to bind it by his agreement that a purchaser should lose nothing upon a contract is implied, and such is clearly not the law: *Toledo etc. Ry. Co. v. Elliott*, 76 Ill. 67; *Cooley v. Perrine* 288 41 N. J. L. 322, 32 Am. Rep. 210; *Story on Agency*, 9th ed., sec. 170. If, then, what was said between the parties, as detailed by the defendant, amounted to a contract on behalf of the plaintiff to repay the defendant all money which he might lose on the

Anderson contract (which is certainly very doubtful), the plaintiff is not bound thereby, because no authority to make it was shown. The plaintiff having made a clear case, and the defense wholly failing for want of proof tending to establish a fact material and necessary thereto, the court was justified in peremptorily instructing the jury to find for the plaintiff."

We are of the opinion that the circuit court did not err in refusing to allow the defense to introduce proof showing a custom of agents of cigarette manufacturers to make contracts for rebates in the city of Chicago at about the time the memoranda or agreements offered in evidence bear date, as the testimony of Mr. Heegaard shows he did not rely upon a custom at the time the memoranda or agreements offered in evidence were made, but that he relied upon the statement of Avery that he had obtained authority from his principal to make such contract. Before the contract was made, as appears from Mr. Heegaard's testimony, Avery, in effect, informed him he had no authority to make such agreement, but that he would consult his principal in Rochester, where he expected to go in a short time; that no contract was made until his return from Rochester, when he informed Heegaard it was all right, and gave him the memoranda or agreements offered in evidence.

We are of the opinion there is no reversible error in this record, and that the judgment should be affirmed.

AN AGENT SIGNING A CONTRACT in his own name is personally liable thereon, although he describes himself as agent: *Stone v. Wood*, 7 Cow. 453, 17 Am. Dec. 529. The word "agent" appended to a name is merely descriptio personae: Note to *Tarver v. Garlington*, 13 Am. St. Rep. 632. See, further, *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193, 18 Pac. 320; *Tarver v. Garlington*, 27 S. C. 107, 13 Am. St. Rep. 628, 2 S. E. 846.

WARRANTY BY AGENT.—A general agent employed to carry on a business with power to sell also has power to warrant, if it is usual to give a warranty when making a sale in such business: *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199, 35 N. E. 135; note to *Bradford v. Manly*, 7 Am. Dec. 131; but a special agent does not have authority to warrant unless it is specifically given: *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247, 28 N. E. 718; *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210.

WEST CHICAGO STREET RAILROAD COMPANY v.
LIDERMAN.

[187 Ill. 463, 58 N. E. 367.]

APPEAL—WAIVER OF OBJECTION TO REFUSAL OF PEREMPTORY INSTRUCTIONS.—Where an instruction to return a verdict for the defendant was asked and refused at the close of the plaintiff's testimony, and again at the conclusion of all the evidence, the defendant does not, by submitting its case to the jury on the evidence and instructions as to the law, waive the right to assign error upon the refusal of its peremptory instructions.

NEGLIGENCE—CONTRIBUTORY.—THE DOCTRINE OF COMPARATIVE NEGLIGENCE does not prevail in Illinois. Where a party seeks to recover damages for a loss which has been caused by negligence, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury, and the burden is upon him to show not only negligence on the part of the defendant, but also that he was not guilty of negligence.

NEGLIGENCE—RISKING LIFE TO SAVE ANOTHER—EXCEPTION.—A person has a right to risk his own life or limb in an effort to save the life of another person, and cannot be charged with contributory negligence in so doing, unless his act is rash or reckless; but such rule does not apply if the person attempted to be rescued was placed in the position of danger through the fault of the person injured.

NEGLIGENCE—RISKING LIFE TO SAVE ANOTHER—QUESTION FOR JURY.—Whether one who risks his life to save another acted with reasonable prudence or with recklessness is a question for the jury under all the facts and circumstances of the case, where reasonable minds might draw different conclusions therefrom.

NEGLIGENCE OF PARENTS—CHILDREN ON STREET.—While it is the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets, it is not negligence per se to permit infants to be upon the streets of a city.

NEGLIGENCE—CONTRIBUTORY.—TO JUSTIFY A NON-SUIT on the ground of contributory negligence the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy.

NEGLIGENCE—PARENT AND CHILD—MOTHER RESCUING CHILD.—A mother whose child has momentarily escaped from her has a right reasonably to presume that if the child became exposed to danger others would not negligently injure it, and seeing it so exposed, she had a right to make all reasonable efforts to rescue it.

John A. Rose, Louis Boisot, Jr., and W. W. Gurley, for the appellant.

Nelson Monroe, for the appellee.

468 WILKIN, J. Appellee recovered a judgment against appellant in the superior court of Cook county in an action on the case for personal injuries, which has been affirmed by the **467** branch appellate court for the first district. The declaration charged both negligence and willful misconduct by the employes of the defendant, causing the injury sued for. It was not, however, claimed upon the trial, nor is it now, that the act was wanton or willful. The first additional count states the cause of action sued for, as follows: That while the plaintiff, with due care, was going upon a street and the track of the defendant to rescue her infant child from being run over and injured by an approaching train of defendant's cars, defendant negligently operated said train so that the grip-car ran against plaintiff, throwing her to the ground and injuring her.

The accident occurred on July 19, 1897. Plaintiff then lived at 447 Halstead street, on which the defendant operated a line of cable-cars. On that afternoon she went to a grocery store on the opposite side of the street, a short distance north of her residence, taking with her a child about three years of age. As she came out of the store she stopped on the sidewalk to speak to a friend whom she met there. She at first held the child by the hand, but during the conversation unconsciously let go of it, and a moment later, as she testified, saw it upon the street-car track and a car approaching at the usual rate of speed, some eighty or ninety feet away. She instantly ran toward the child, throwing up her hands and crying out to stop the car. Another person saw the danger to the child and called to the gripman in charge of the car to stop. The evidence is conflicting as to whether he was guilty of negligence in failing to stop the car before the collision, and also whether the child was upon the track or in actual danger at the time plaintiff ran in front of the car. It is admitted, however, that these and all other controverted questions of fact, except due care on the part of the plaintiff, have been settled adversely to defendant below. On this branch of the case it is earnestly contended that the evidence neither proved nor tended to prove that fact, and therefore the trial court **468** erred in refusing instructions asked by the defendant to take the case from the jury, and this is the only point of controversy in this court.

Counsel for appellee, relying upon the case of *Peirce v. Walters*, 164 Ill. 560, 45 N. E. 1068, and later cases to the same effect, insists that defendant, by submitting its case to the jury

on the evidence and instructions as to the law, waived the right to assign error upon the refusal of its peremptory instructions. The position is without force and wholly unsupported by the cases cited. Here an instruction to return a verdict of not guilty was asked and refused at the close of plaintiff's testimony, and again at the conclusion of all the evidence. It was not until after the refusal of the latter that the defendant company proceeded to submit general instructions to be given the jury. This has always been held to properly raise the question of law whether there is any evidence in the record fairly tending to prove a plaintiff's case. In the cases cited the only request to instruct the jury to find for the defendant was found in a series of instructions asked when the case was submitted to the jury.

Counsel for appellee, though insisting that plaintiff below was shown to have been in the exercise of due care for her personal safety at the time of the accident, insists upon the rule of law held in some jurisdictions to apply in such actions, "that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." Such has never been the law in this state. Here the rule is: "Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised ⁴⁶⁹ proper care and circumspection, or, in other words, that he was not guilty of negligence": *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *Indianapolis etc. R. R. Co. v. Evans*, 88 Ill. 63; *Abend v. Terre Haute etc. R. R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Calumet Iron etc. Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *North Chicago St. Ry. Co. v. Louis*, 138 Ill. 9, 27 N. E. 451; *Illinois Cent. R. R. Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358, and later cases.

The question, then, for our decision upon this record must be, Did the evidence produced upon the trial, with all its reasonable intendments, justify the jury in concluding that the plaintiff was, under all the circumstances, in the exercise of reasonable care for her own safety at the time she received the injury sued for? It may—we think must—be conceded that,

leaving out of view the peril of her infant child, she was guilty of such contributory negligence as would defeat the action. Counsel for appellant admit that the general rule is that a person has a right to risk his own life or limb in an effort to save the life of another person, and cannot be charged with contributory negligence in so doing.

In *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721, the action was for negligently causing the death of the plaintiff's intestate, who was killed while attempting to rescue a child on the track of the defendant company under circumstances not unlike those surrounding the parties in this case. After stating that the conduct of the deceased would have been grossly negligent but for the effort to save the child, it is said: "But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which ⁴⁷⁰ the deceased was placed it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding deceased free from negligence, under the rule as above stated."

This is a clear statement of the law and the reason upon

which the rule rests, and is abundantly sustained by the authorities. Whether in this case the plaintiff acted with reasonable prudence, or with recklessness, in attempting to save her child, was a question for the jury under all the facts and circumstances in evidence.

There is, however, an exception to the general rule above stated, which is, that if the person attempted to be rescued was placed in the position of danger through the fault of the person injured, the danger will not excuse the attempt to save him, and counsel for appellant insist that this case falls within that exception. Reliance in support of this position is especially placed upon ⁴⁷¹ the case of *Atlanta etc. Ry. Co. v. Leach*, 91 Ga. 419, 44 Am. St. Rep. 47, 17 S. E. 619. In that case the injured party had wrongfully taken a child upon a trestle-work of a railroad, and was killed while attempting to save it from injury by an approaching train. The court there said: "In making the efforts, however, he was neglecting his own safety, and thus violating his duty to the company. He had the choice of two fearful alternatives, and he undertook, and it was creditable to him, to perform the duty he owed the child, but it must not be overlooked that he was himself responsible for the situation that forced this awful alternative upon him." There, it will be seen, there was upon the part of the deceased something more than mere passive negligence—mere omission of duty—but an affirmative act in taking the child into a place of imminent danger. Here, the most that can be said is that the mother was negligent in failing to give proper attention to the child.

It is undoubtedly the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets; but the standard of such care is not capable of being defined by the law, and each case must depend upon its own facts and circumstances. That it is not negligence per se to permit infants to be upon the streets of a city was held by this court in *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553.

In *Fox v. Oakland Con. St. Ry. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25, the action was against the street railway company for negligently running over and killing a child four and a half years of age. The child had been permitted to play in the street in front of the family residence in the city of Oakland, and occasionally went upon the street on which it was

killed, about one hundred feet away from the dwelling, though it had been cautioned by its mother not to do so. It had been absent from home some fifteen minutes at the time of the accident. The ⁴⁷² evidence was to the effect that he was an ordinarily obedient child; that his parents were laboring people and had only one other child, a thirteen year old daughter, who was attending school. To the contention on behalf of defendant below that the evidence established negligence per se, the court say: "If the term 'negligence' signified an absolute quantity or thing, to be measured in all cases in accordance with some precise standard, much of the difficulty which besets courts in the solution of this class of cases would be at once dissipated. But, unfortunately, it does not. Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a very general rule it is a question of fact for the jury—an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence, and if there be room for such difference the question must be left to the jury: *Beach on Contributory Negligence*, sec. 163; *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447; *Van Pragg v. Gale*, 107 Cal. 438, 40 Pac. 555. Within these principles the evidence of this case cannot be said to establish negligence per se. Parents are chargeable with the exercise of ordinary care in the protection of their minor children, and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes without satisfying herself of its whereabouts, was, under all the circumstances, a ⁴⁷³ want of ordinary care, was, we think, a fairly debatable question." *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447, *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67, *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108, *Slattery v. O'Connell*, 153 Mass.

94, 26 N. E. 430, and *Creed v. Kendall*, 156 Mass. 291, 31 N. E. 6, are to the same effect.

It is said that in the Massachusetts cases, *supra*, facts were shown such as pecuniary circumstances, condition of health, etc., of the parents, whereas here nothing of the kind appears. It is true that in *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553, and perhaps the decisions of other courts on the question of parental care in keeping their children off the streets of cities, allusion is made to the fact that the parents of many children in large cities are laboring people and in limited circumstances, unable to employ nurses and servants to attend their children. Such facts do not, however, determine the right of the parent to suffer children to go upon the street, but the question decided in such cases is, that it is not negligence *per se* for them to do so. It certainly cannot be said, as a matter of law, that it is negligence *per se* for a wealthy or healthy parent to permit his infant child to be upon a public street where he knows it is exposed to danger, but that it is not such negligence if the parent be sick or poor, depending upon his daily labor for the support of himself and family, and the weight of authority, we think, is clearly against any such discrimination: *Fox v. Oakland Consolidated St. Ry. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25, and cases there cited.

If, in this case, the plaintiff had simply permitted her child to be upon this street unattended, and it had been injured or killed through the negligence of the defendant company, and she had brought an action for that injury, it is clear that under the authorities the question whether she was guilty of such contributory negligence as would defeat her action would have been a question for the jury. Can it be said, as a matter of law, that she exercised a less degree of care in this case? It is true that nothing was shown tending to prove her inability to ⁴⁷⁴ keep constant watch over her child or to employ others to do so; but did she so far fail to exercise reasonable care in restraining it from being exposed to danger that a court can say, as a matter of law, that she was guilty of contributory negligence? As before stated, her own evidence shows that she held the child by the hand, and that it slipped away from her only for a moment and that she immediately pursued it. Can the court say, as a matter of law, that she was bound to hold the child in her arms, or hold it by the hand, or keep her eyes on it, constantly while upon the street?

"When facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law, and when the case is all against the plaintiff there may properly be a nonsuit; but in the language of Mr. Field, 'to justify a nonsuit on the ground of contributory negligence the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy'": Beach on Contributory Negligence, secs. 447-449; Chicago etc. R. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Hoehn v. Chicago etc. Ry. Co., 152 Ill. 223, 38 N. E. 549; Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Chicago etc. R. R. Co. v. Ptacek, 171 Ill. 9, 49 N. E. 191.

It seems to us clear beyond controversy that all reasonable persons would not say, under the facts showing the conduct of this mother prior to the time that her child got upon the street-car track, that she was guilty of negligence—that very many would consider her reasonably careful. The question was, therefore, one of fact and proper to be submitted to a jury. She had a right reasonably to presume that if the child for the time escaped from her and became exposed to danger others would not negligently injure it, and, seeing it suddenly ⁴⁷⁵ so exposed, she had the right, and it was her duty not only to the child but to the defendant itself, to make all reasonable efforts to rescue it from that danger.

On the whole record we find no reversible error, and the judgment of the appellate court will be affirmed.

THE DOCTRINE OF COMPARATIVE NEGLIGENCE has never been recognized in Minnesota: Fonda v. St. Paul City Ry. Co., 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 166; or in Missouri: Hurt v. St. Louis etc. Ry. Co., 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1.

CONTRIBUTORY NEGLIGENCE.—THE BURDEN OF PROOF as to contributory negligence is on the defendant, unless the plaintiff's own evidence establishes it: Pullman etc. Co. v. Adams, 120 Ala. 581, 74 Am. St. Rep. 53, 24 South. 621. Compare Bartram v. Sharon, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143.

NEGLECTENCE—RESCUING ANOTHER.—The law has so high a regard for human life that it will not impute negligence to an effort to preserve life unless made under circumstances which constitute rashness: See the monographic note to Gilson v. Delaware etc. Canal Co., 36 Am. St. Rep. 849; Maryland Steel Co. v. Marney, 88 Md. 482, 71 Am. St. Rep. 441, 42 Atl. 60. It is not contributory negligence in a mother to attempt to rescue her child from an approaching train, although she may have negligently allowed it to go on the track: Donahoe v. Wabash etc. Ry. Co., 83 Mo. 560, 53 Am. Rep. 594.

LANCASTER v. LANCASTER.

[187 Ill. 540, 58 N. E. 462.]

WILLS—DEVISE TO A CLASS.—A DEVISE to the legal and direct descendants, "the heirs of their bodies begotten and their heirs," is limited to the "heirs of the bodies" of the ancestors named, and only those of that class who are living at the testator's death will take.

WILLS—DEVISE TO A CLASS—WHEN TAKES EFFECT.--When there is a simple devise to a class, and the will neither expressly nor by necessary implication fixes a time when the devisees are to be ascertained or when the division is to be made, the law will fix such time at the testator's death, that being the time when the will first speaks.

WILLS—DEVISE TO A CLASS—WHO TAKE.—When a devise is to a class, the death of one member of the class before the testator will not cause a lapse of any part of the gift, but those of the described class who survive the testator will take the whole.

WILLS—DEVISE OF LIFE ESTATE WITH REMAINDER. A will devising a life estate to one, with a remainder "to heirs of her body begotten, after her death," gives the first devisee a life estate, and upon her death the "heirs of her body" living at the death of the testator will take, not as her heirs generally, but by virtue of the original gift to them as a class, to be ascertained when the will should take effect.

Follett W. Bull and Louis Grollman, for the guardian ad litem.

Hamline, Scott & Lord, Frank E. Lord, and Gwynn Garnett, for the appellee Lancaster.

William Prescott, for the appellee William Wallace.

Smith, Helmer, Moulton & Price, for the other appellees.

542 WILKIN, J. This is a proceeding in chancery by Robert H. Lancaster, one of the devisees under the will of Nimrod Lancaster, in the superior court of Cook county, to partition certain lots and tracts of land, and adjust encumbrances thereon, described in the bill, as a part of the estate of Nimrod Lancaster, deceased, late of Chicago, who died testate on June 14, 1895.

543 The will, which is the basis of the claim of the respective parties to the lands in controversy, was executed in July, 1890, and is as follows:

"Chicago, July —, 1890.

"Know all persons by these presents, That I, Nimrod Lancaster, of the city of Chicago, do hereby make my last will and testament, and that I am firm in body and sound in mind.

"Item first—I will that all my estate, both real and personal, shall be divided into four equal parts.

"Item second—I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my eldest brother, William P. Lancaster, and his wife, Mary Lancaster, (now both deceased,) the one-fourth part of my estate so divided as above mentioned.

"Item third—I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my brother Robert P. Lancaster, and Amanda Lancaster, his wife, (now both deceased,) the one-fourth part of my estate so divided as above mentioned.

"Item fourth—I give and bequeath to the heirs of their bodies begotten, and their heirs, of my sister, Sallie Wallace, and her husband, Thomas Wallace, (now both deceased,) one-fourth part of my estate so divided as above mentioned.

"Item fifth—I give and bequeath to my sister-in-law, Mrs. Edmonia P. Guard, (now living at Cleves, Ohio,) to herself during her lifetime and to heirs of her body begotten, after her death, one-fourth part of my estate so divided as above mentioned.

"Item sixth—It is my will, and I so bequeath, that my friend, William A. Barton, and his wife, Harriet Barton, shall remain in and occupy, free of rent, the house (2941 Wabash ave.) they now have, for ten years after my death.

"NIMROD LANCASTER."

"Item seventh—I do hereby constitute and appoint Mrs. Mary Phipps, my niece, and her husband, William C. Phipps, my executors, to execute this my last will and testament.

"November 23, 1891."

The petitioner is one of the "heirs of the bodies" of Robert P. and Amanda Lancaster, designated in item 3.

Upon the hearing below there was no controversy as to the description of property sought to be partitioned, the encumbrances or the right to partition, but the contest ⁵⁴⁴ arose as to the proper construction to be placed upon the second, third, fourth, and fifth items of the will, and several interpretations were insisted upon in the court below by the respective parties, but one of which, as stated below, is urged here. The decree there rendered was in conformity with the prayer of petitioner as to the interpretation and construction of the will, finding, in effect, that under each clause the devisees who took the estate were the persons who, at the time of the testator's death,

were the heirs, generally, of the ancestors named in the several items. From that decree this appeal is prosecuted, and the only construction here insisted upon by the appellants, different from that placed upon it by the chancellor, is, that under the language, "to the legal and direct descendants," all who have descended directly from the ancestors named in items 2, 3, and 4 take as devisees, and that the several gifts are not affected by the subsequent words, "the heirs of their bodies begotten and their heirs."

Although the rights of appellants arise under item 3 of the will, in construing the several gifts it will be sufficient for the present to give attention, first, to item 2, the language of each, except the last, being in substance the same. What is the proper construction to be given to the language of this item, "I give and bequeath to the legal and direct descendants—the heirs of their bodies begotten and their heirs—of my eldest brother, William P. Lancaster, and his wife, Mary Lancaster (now both deceased), the one-fourth part of my estate so divided as above mentioned"? The clause "to the legal and direct descendants" would, if standing alone, undoubtedly be interpreted as designating a large class; but it is clearly qualified by the language which follows: "The heirs of their bodies begotten and their heirs." This latter clause is a parenthetical expression, and is to be understood as explaining or qualifying the clause immediately preceding. Interpreted as such parenthetical clauses are generally ⁵⁴⁵ understood, the sentence would read as though it had been written, "I give and bequeath to the legal and direct descendants—that is to say, the heirs of their bodies and their heirs—of my eldest brother, William P. Lancaster, and his wife," etc. This construction is made without adding to the language employed, but by simply setting out in words what is actually expressed by the grammatical construction and punctuation of the sentence. Nor does it result in rejecting the first clause, as claimed by appellants, but it gives effect to both clauses. "The heirs of their bodies" are, in fact, "legal and direct descendants," but it cannot be said that all the "legal and direct descendants" are "heirs of their bodies." The interpretation insisted upon by appellants would necessarily reject the second clause, and violate the well-known general rule of construction which requires the giving effect to every part of a written instrument in its interpretation, if it can be done.

The next consideration is, Who, under the foregoing construction, shall take under item 2 of the will? Manifestly, only those who, singly or as a class, come within the description of "heirs of the bodies" of the ancestors named. Being a simple devise to a class, and the will not expressly or by necessary implication fixing a time when the devisees are to be ascertained or when the division is to be made, the law will fix it at the testator's death, that being the time when the will first speaks: *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210. See, also, *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254. From the evidence in the record we find the only person living at the testator's death who comes within the description "heirs of the bodies" of William P. and Mary Lancaster to be the defendant John E. Lancaster, the son. The decree below, however, divides the part of the estate mentioned in that item into two parts, giving one to John E. Lancaster and the other to the heirs, generally, of his deceased sister, Mrs. Jane Grubbs, they being the only children of the ancestors mentioned; ⁵⁴⁶ and it is contended by appellee that the estate should be divided, according to the statute of descent, among the heirs, generally, of the ancestors mentioned in the several items. The position cannot be sustained. Jane Grubbs was living at the time of the making of the will but not at the date of the testator's death, and was, therefore, not in being at the time the estate vested. Had the devise been to Jane Grubbs and John E. Lancaster, specifically, as "the heirs of the bodies" of the ancestors, then the share of Mrs. Grubbs, she being dead at the time of the vesting of the estate, would have lapsed, and her heirs generally, even in that case, could not have taken. The devise here being to a class, the death of one of them before the testator will not cause a lapse of any part of the gift, "but those of the described class who survive the testator will take the whole": *Am. & Eng. Ency. of Law*, 13, 1st ed., 33, and cases cited. John E. Lancaster is the sole person coming within the designated class, and the children and grandchildren of Mrs. Grubbs can, by no proper construction of the will, be included therein.

It is unnecessary to enter into a discussion of items 3 and 4 of the will, as the language of each is the same as in item 2, and the same rules of construction and interpretation necessarily apply. Item 5 is unlike the others, but it is a direct gift for life to Mrs. Edmonia P. Guard, with remainder to the class named in that devise: See *Hurd's Stats.* 1897, sec. 6, p.

391. The life estate being at an end, Mrs. Guard having died, the "heirs of her body" living at the death of the testator take that part of the estate, and take it not as her heirs generally but by virtue of the original gift to them as a class, to be ascertained when the will should take effect.

For the error indicated the decree below will be reversed and the cause remanded, with direction to the superior court to make partition of the lands in conformity with the views herein expressed.

WILLS.—GIFTS TO A CLASS and who may take thereunder are discussed in the monographic note to *Thomas v. Thomas*, 73 Am. St. Rep. 413-440. If a legacy is given by will to a class of individuals in general terms, and no period is fixed for the distribution, such time is the death of the testator: *Thomas v. Thomas*, 149 Mo. 426, 73 Am. St. Rep. 405, 51 S. W. 111. A gift by will, to take effect upon the termination of a life estate, of a specified sum to each of the children of a certain daughter of the testator, includes not only her children in being at the death of the testator, but also those born or en ventre sa mere prior to the death of the life tenant: *McLain v. Howald*, 120 Mich. 274, 77 Am. St. Rep. 597, 79 N. W. 182.

NOEL v. PEOPLE.

[187 Ill. 587, 58 N. E. 616.]

CONSTITUTIONAL LAW — PHARMACY ACT — ARBITRARY POWER.—A law which invests any board with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid, since it makes an unjust discrimination between persons coming within the same class. Hence, a statute is invalid which authorizes a board of pharmacy to issue permits to persons engaged in business in a village or other locality to sell domestic remedies and proprietary medicines, provided such board sees fit in its discretion to issue such permit.

CONSTITUTIONAL LAW—PHARMACY ACT—LEGISLATURE DELEGATING POWER.—The legislature may, in the interest of the public health, regulate the sale of domestic remedies and proprietary medicines, but it cannot delegate such functions to a board or officials by a law conferring arbitrary and discretionary power upon such statutory officials.

CONSTITUTIONAL LAW—POLICE POWER—PHARMACY ACT—EXCLUSIVE PRIVILEGE.—While the legislature may, under the police power, pass laws for the benefit and protection of the public health, a statute has no such tendency which confers upon registered pharmacists the exclusive right to sell patent and proprietary medicines without requiring them to make any inspection of the same, and such statute is invalid as conferring a special power in violation of a provision of the constitution prohibiting special legislation.

CONSTITUTIONAL LAW—PHARMACY ACT—STATUTE PART VALID.—Where a statute attempts to accomplish two or more objects, and is void as to one, it may still be valid as to the other. Hence, a pharmacy act, while void as to its prohibition of the sale of patent and proprietary medicines and domestic remedies by any other person than a registered pharmacist, is valid as to a prohibition of the compounding of medicines and the sale of the same as compounded by a person other than a registered pharmacist.

Action of debt by the people of the state of Illinois against Noel, to recover a penalty for the violation of section 2 of the pharmacy act. Since 1880 Noel had been in business of preparing and selling certain medicinal articles, selling chiefly at wholesale. The manager of the business was his son, a regularly licensed physician. Noel applied to the state board of pharmacy for a license to sell his products, tendering the regular fee. The license was refused, no reason being assigned therefor. Later he sold a package of his medicine. Noel's place of business was not a drug store, and he did not keep drugs.

E. A. Sherburne, for the appellant.

Charles S. Deneen, state's attorney, Fred L. Fake, Gabriel J. Norden, and Kitt Gould, for the people.

⁵⁸⁹ **MAGRUDER, J.** Upon the trial of this case in the court below, the appellant asked the court to hold as law, in the decision of the case, several propositions of law, questioning the constitutionality of sections 2 and 8 of the act of the legislature of Illinois entitled, "An act to regulate the practice of pharmacy in the state of Illinois," as amended and in force July 1, 1895: Hurd's Stats. 1897, pp. 1075, 1076. These propositions of law were refused by the trial court, and to the ruling of the court in this regard exception was duly taken by the appellant. The question thus presented for our consideration is the constitutionality of said sections 2 and 8 of the pharmacy act.

Section 2 is as follows: "It shall be unlawful for any person not a registered pharmacist within the meaning ⁵⁹⁰ of this act to open or conduct any pharmacy, dispensary, drug store, apothecary shop or store, for the purpose of retailing, compounding, or dispensing drugs, medicines, or poisons, and any person violating the provisions of this section shall be liable to a penalty of not less than twenty nor more than one hundred dollars for every such violation; provided, however, that nothing in this act shall prevent any person or persons owning a

drug store or pharmacy who shall employ and place in active and personal charge of the same a registered pharmacist, and that nothing herein contained shall apply to nor in any manner interfere with the practice of any physician, or prevent him from supplying to his patients such articles as may seem to him proper, nor with the exclusively wholesale business of any wholesale druggist; nor with the sale of patent and proprietary medicines and domestic remedies by retail dealers in localities as hereinafter provided."

Section 8 of the act is as follows: "The board of pharmacy may in their discretion issue permits to persons, firms, or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the board of pharmacy may deem proper. Each applicant for this permit shall pay to the said board the sum of one dollar before said permit shall issue. Said permit shall specifically state just what the holder thereof is allowed to sell."

Section 4 of the act is as follows: "The term 'drug store' or 'pharmacy' shall for all purposes of this act be construed to mean a store, shop, or other place of business where drugs, medicines, or poisons are compounded, dispensed, or sold at retail."

The proviso to section 2 provides that nothing contained in the act shall apply to, or interfere with, the sale of patent and proprietary medicines and domestic remedies by retail dealers in localities "as hereinafter ⁵⁹¹ provided." The words "as hereinafter provided" refer to section 8 of the act. The latter section confers upon the board of pharmacy the power in their discretion to issue permits to persons, firms, or corporations engaged in business in villages or other localities, empowering them to sell the usual domestic remedies and proprietary medicines under such restrictions as the board may deem proper. It is manifest that section 8 vests an arbitrary power in the board of pharmacy to say who shall and who shall not sell the usual domestic and proprietary remedies in villages and other localities, and just exactly what they are allowed to sell. Section 8 in no way regulates or controls the discretion vested thereby in the board. The official discretion conferred upon the board is unregulated, and not subjected to any permanent provisions operating generally and impartially. No conditions are prescribed upon which the permit authorizing the sale of the usual domestic remedies and proprietary medicines is to be issued. A

law which thus invests any board or body of officials with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. A person, firm, or corporation engaged in business in a village or other locality may sell these domestic remedies and proprietary medicines if a permit is obtained from the board of pharmacy, provided such board sees fit in its discretion, and under such restrictions as it may deem proper, to issue such permit. The board is thus authorized to confer a privilege upon one person, firm, or corporation, and to deny the same privilege to any other person, firm, or corporation, and is not required to be governed, in doing so, by any fixed rules or regulations, but may be moved thereto only by its own caprice or favoritism. Laws thus conferring discretionary and arbitrary power upon statutory officials are not only invalid for the reasons already stated, but amount in effect to a ⁵⁹² delegation by the legislature of its legislative functions to the board or officials in question. The legislature undoubtedly has the power, in the interest of the public health, to pass a law, regulating the disposition of these domestic remedies and proprietary medicines; but instead of doing so in section 8, it has abdicated its own power upon the subject, and conferred such power upon the board of pharmacy to be exercised according to the discretion of the board: *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758; *Cairo v. Feuchter*, 159 Ill. 155, 42 N. E. 308; *Monmouth v. Popel*, 183 Ill. 634, 56 N. E. 348.

But independently of the considerations thus far presented, section 2 not only forbids any person to compound or dispense drugs or medicines, and sell the drugs or medicines so compounded at retail unless such person is a registered pharmacist, but it also forbids any person to sell patent and proprietary medicines and domestic remedies at retail unless such person is a registered pharmacist. In other words, a druggist is not only forbidden by section 2 to sell drugs compounded by himself, unless he or his employé is a registered pharmacist, but he is also forbidden to sell patent and proprietary medicines and domestic remedies not compounded by himself, unless he or his employé is a registered pharmacist. Section 2 thus confers upon registered pharmacists the exclusive right to sell at retail patent and proprietary medicines and domestic remedies. This is apparent from the last clause of the proviso to section 2. The fact that the sale of these remedies in certain localities

is mentioned as an exception makes it clear that their sale in other places was included in the prohibition with all other drugs, medicines, and poisons. "When the legislature has attached a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the statute would have included the subject matter of the proviso": 23 Am. & Eng. Ency. of Law, 437.

⁵⁹³ The act contains nowhere any provision for the inspection or analysis of these patent or proprietary medicines by the registered pharmacists who are clothed with the power to sell them.

Undoubtedly, the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled that the exercise of the police power must be limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare: *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707. When it can be seen from the provisions of a statute that it has no tendency to promote the public health, safety, morals, comfort, or welfare, the courts are authorized to declare it invalid. It is unquestionably true that the state has as much right to regulate the sale of patent and proprietary medicines and domestic remedies as it has to regulate the sale of any other kinds of medicines and remedies. But these patent and proprietary medicines and remedies are generally put up in sealed packages. In this form they can as well be sold by any person as by a registered pharmacist. The vice of the present pharmacy act is, that it gives to the registered pharmacists the exclusive privilege of selling these patent and proprietary medicines and remedies, and excludes all other persons from doing so, while, at the same time, it makes no requirement of such registered pharmacists that they make any analysis, inspection, or examination of the same. In this regard the act gives to registered pharmacists a monopoly of the business of selling patent medicines without in any manner protecting the public health. The public health is not protected by limiting these sales to registered pharmacists who make no examination of what they sell.

Counsel for the people claim that registered pharmacists are more likely to know the qualities of these patent medicines than other persons who are not registered ⁵⁹⁴ pharmacists. But registered pharmacists will be as apt as other men to sell such patent medicines as there is a public demand for, when

they are relieved of all responsibility for the character of such medicines, and are not required in any way to guarantee their character or adaptability to the cures which they claim to effect.

Section 2 of article 2 of the constitution of this state provides that "no person shall be deprived of life, liberty, or property without due process of law." Involved in the right to own property is the right to sell it; and when the owner is deprived of the right to sell his property, he is deprived of his property within the meaning of the constitution, because there is thereby taken from him one of the incidents of ownership. Section 22 of article 4 of the constitution provides that "the general assembly shall not pass local or special laws for granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever." To confer upon registered pharmacists the right to sell these patent and proprietary medicines, without requiring of them to make any inspection or examination of the same, is to confer upon them a special and exclusive privilege in violation of said section 22 of article 4, when, at the same time, such right of sale is denied to all other persons, firms, or corporations.

The views thus expressed are sustained by a decision made by the supreme court of Minnesota in the case of *State v. Donaldson*, 41 Minn. 74, 42 N. W. 781. In that case the supreme court of Minnesota, in commenting upon the provisions of an act similar to the pharmacy act of this state, say: "The manifest purpose of the act was to protect the public against the mistakes and ignorance of incompetent and unskilled persons in the preparation and sale of drugs and medicines. . . . This is the expressed object of the general provisions of this act. They all look to the protection of the health and lives of the public by restricting the business of preparing and ⁵⁹⁵ dispensing or selling drugs and medicines to those who have the requisite knowledge and skill on the subject. . . . Now, it is a matter of common knowledge that what are called 'patent' or 'proprietary' medicines are prepared ready for immediate use by the public, put up in packages or bottles labeled with the name, and accompanied with wrappers containing directions for their use, and the conditions for which they are specifics. . . . There is nothing that calls into use any skill or science on the part of the one who sells them. One man can do it just as well as another. . . . The fact that

the seller is a pharmacist of itself furnishes no protection to the public. . . . Merely to limit their sale to pharmacists would furnish no protection to the public, without some further regulation as to inspection or analysis that would tend to exclude from sale those that might be injurious to health, or something requiring pharmacists to exercise their skill and science in determining the quality and properties of such as they sold. If we turn to our statute we find an entire absence of any such provisions. . . . Had the act made pharmacists responsible for their quality, this might have had some tendency to protect the public." After disposing of the suggestion, as being "too uncertain and attenuated to be entitled to any weight," that the mere fact of limiting the sale to pharmacists would tend to protect the public because they would be more likely than others to know the qualities of patent medicines, the court then proceeds as follows: "In the absence of some other regulations, a statute merely limiting the sale of patent medicines to a particular class would not and could not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of the state. . . . A law enacted in the exercise of the police power must in fact be a police ⁵⁹⁶ law. If it be a law for the protection of public health, it must be a health law having some relation to public health. . . . If it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation. According to the construction claimed for it, the provision of the act as to the sale of patent or proprietary medicines would be of just this character. It would be giving pharmacists a monopoly of the business, without in any manner protecting public health." The reasoning of the Minnesota court is precisely applicable to the case at bar, for the reason that in the Illinois pharmacy act, as was the case with the Minnesota pharmacy act, there is an entire absence of any regulation as to such inspection or analysis of these patent or proprietary medicines by registered pharmacists, as would tend to exclude from sale those medicines that might be injurious to health; nor is there anything in the Illinois act

requiring registered pharmacists to exercise their skill and science in determining the quality or properties of such patent or proprietary medicines as they may sell.

We are, however, not disposed to hold that the whole act is unconstitutional because of the limitation of the right to sell these patent or proprietary medicines to such persons as are registered pharmacists. An act of the legislature may be opposed in some of its provisions to the constitution, while others standing by themselves would be unobjectionable. The fact, that a part of a statute may be unconstitutional will not authorize the courts to declare the remainder void, unless all the provisions are so connected in subject matter, and are so dependent on each other, that the legislature will not be presumed to have passed the one without the other. The ⁵⁹⁷ valid and invalid provisions may even be contained in the same section, and yet be perfectly distinct and separate, so that the one may stand though the other must fall. Where a statute attempts to accomplish two or more objects, and is void as to one, it may still be complete and valid as to the other: *Cooley's Constitutional Limitations*, 5th ed., 211-213; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758; *People v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76; *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1; *People v. Cooper*, 83 Ill. 585; *Hinze v. People*, 92 Ill. 406; 23 Am. & Eng. Ency. of Law, 225-227, and notes.

An examination of the pharmacy act, as amended and in force on July 1, 1895, will show that it had in view the accomplishment of two objects. One of these is to prohibit the compounding of medicines and the sale of the same, as thus compounded, unless such compounding and sale shall be made by a registered pharmacist. The other object is to prohibit the sale of patent and proprietary medicines and domestic remedies by any other person than a registered pharmacist. One case contemplated by the statute is where the druggist or other person puts up prescriptions or compounds medicines and then sells them, while the other case, contemplated by the statute, is the sale of patent and proprietary medicines and domestic remedies without the compounding and putting up of the same by the person selling them. The distinction thus indicated is clearly shown in sections 2, 8, and 14 of the act. While, therefore, we hold the act to be invalid in the respect already pointed out, we yet hold it to be valid, so far as it applies to persons retailing, compounding, or dispensing drugs, medicines,

or poisons where the person so retailing has, at the same time, put up or prepared or compounded the drugs or medicines so sold by him.

For the reasons above indicated we are of the opinion that the trial court erred in refusing to hold as law the propositions of law submitted to it by the appellant ⁵⁹⁸ upon the trial below. Accordingly, the judgment of the criminal court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Mr. Justice Wilkin dissenting.

CONSTITUTIONAL LAW—PHARMACY.—A statute requiring that every person keeping a pharmacy shall be a registered pharmacist, or have in his employ a registered pharmacist, that every person desiring to become a pharmacist shall possess certain qualifications prescribed in the act, to be ascertained as therein provided, and that a registration fee shall be paid, is constitutional: *State v. Heinemann*, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818.

CONSTITUTIONAL LAW—ARBITRARY POWER.—Ordinances that invest a board with an arbitrary discretion which may be exercised in the interest of a favored few are invalid: *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758; *Matter of Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72.

PART OF A STATUTE MAY BE VOID and another part valid: *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, 28 S. W. 756; *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011.

BUTTERFIELD v. SAWYER.

[187 Ill. 598, 58 N. E. 602.]

VESTED RIGHTS—POWER OF LEGISLATURE.—A MERE EXPECTATION of property in the future is not a vested right, and may be changed, modified, or abolished by legislative action.

A CONTINGENT REMAINDER DOES NOT RISE TO THE DIGNITY OF AN ESTATE in the land. It is a mere chance of having an estate if the contingency turns out favorably to the remainderman.

DEEDS—CONSTRUCTION.—Where there is ambiguity in the terms of a deed, or where the language used has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties.

ADOPTION—STATUTE—DEED GIVING REMAINDER TO HEIRS GENERALLY—EFFECT.—A deed conveying a remainder in fee to the "heirs generally" of the life tenant, if she should die leaving no child, gives such remainder to an adopted child, under a statute which provides that such child shall be deemed, for the

purposes of inheritance, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, even though such statute was passed after the deed was made.

Bill for a partition of lands by appellants claiming to be the heirs at law of Adeline B. Gellatly. Justin Butterfield and wife by deed gave their daughter Adeline a life estate in the lands in question, the remainder to go to her child or children living at her decease, and in default of such children to her heirs generally. After the deed was made, Adeline Butterfield married one Gellatly, they having no children, and later she became a widow. She adopted Roy Cramer, who became Roy Gellatly, the decree of adoption providing that he should, to all legal intents and purposes, be her child, and for the purposes of inheritance and all other legal consequences, the same as if he had been born to her in lawful wedlock. She died, leaving no child by birth. The adopted child, Roy Gellatly, was in possession of the property by his guardian. The lower court entered a decree finding that by virtue of the decree of adoption Roy Gellatly became the remainderman under the deed, and upon Adeline Gellatly's death he became seised in fee simple of the property described in the deed. The appellants were enjoined from claiming any right, title, or interest in the premises.

John T. Barker, for the appellants.

Bulkley, Gray & More and Heckman, Elsdon & Shaw, for the appellees.

600 WILKINS, J. The habendum clause of the deed in question here, after creating a life estate in the grantee, Adeline Butterfield, presents what is sometimes termed a contingency with a double aspect. The first event or aspect contemplated is that the grantee should have a child or children, who should take the remainder in fee simple, limited upon the life estate. In the event of the death of the life tenant leaving surviving her no child or children to take the remainder, then the second aspect of the deed was to become effective and vest the remainder in the "heirs generally of the said Adeline Butterfield," with the exception of George Butterfield. The court below decreed that Roy Gellatly, the adopted child of Adeline Gellatly (née Butterfield), by virtue of his adoption became the 601 "child" of the grantee, within the meaning of the language of the deed. This decree is earnestly opposed by the appellants on the ground that at the date of the conveyance in

question, February, 1853, there was in effect no statute of adoption in this state, and that the grantor, therefore, could not and did not, in creating the remainder in the deed in the "child" or "children" of Adeline Gellatly, contemplate the adoption by her of a child, and that to so decree is, in effect, the creation of an artificial child, which at the date of the deed could have and did have no existence in contemplation of law or in the mind of the maker of the deed.

The question presented for our decision is, Who is entitled to the fee in the premises in controversy? And in our view of the case, so far as the ultimate vesting of the fee is concerned, it does not matter whether or not Roy Gellatly, the adopted child, is a "child" within the meaning of the deed, and entitled as such to the remainder upon the determination of the life estate. If it should be held that the circuit court committed no error in its finding, the remainder, as a matter of course, vests in Roy Gellatly. If, however, it be conceded that that finding, in so far as it holds Roy Gellatly a "child," within the meaning of the deed, is erroneous, still, in our opinion, he must take the fee as "heir generally" of Adeline Gellatly under the second aspect of the contingency in the deed.

Appellants and their alleged cotenants, if entitled to the fee at all, must be the "heirs generally" of Adeline Gellatly. Their estate as such prior to her death would have been but a mere expectancy, contingent upon her death without child or children in whom the remainder should vest, and in no sense a vested right. It is well settled that a mere expectation of property in the future is not a vested right, and may be changed, modified, or abolished by legislative action: *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427, 33 N. E. 51; *Henson v. Moore*, 104 Ill. 403. A contingent remainder such as appellants⁶⁰² had in the premises prior to the decease of Adeline Gellatly does not rise to the dignity of an estate in the land and confers no interest in the seisin. Strictly speaking, it is not an estate at all, but a mere chance of having one if the contingency turn out favorably to the remainderman: 20 Am. & Eng. Ency. of Law, 849. It will be conceded that if Adeline Gellatly had died leaving no child capable of becoming her heir at law, appellants and their alleged cotenants would be entitled to the fee in the premises in controversy under that clause of the deed granting the remainder to the "heirs generally of the said Adeline Gellatly."

It is earnestly insisted on behalf of appellants that the grantor by the term "heirs generally" meant "collateral heirs," but we find no warrant in the deed for so holding. The deed itself does not show that he used the language "heirs generally" in any other than its commonly accepted legal sense. To hold otherwise is to enter the field of speculation as to his intentions, which is not permissible. In giving construction to deeds we are confined to the terms of the instrument itself, the object being to ascertain the intention of the grantor as expressed by the language used, and not the unexpressed purpose which may at the time have existed in his mind. Where there is no ambiguity in the terms used, or where the language used has a settled legal meaning, the instrument itself is the only criterion of the intention of the party: *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596; *Bradish v. Yocum*, 130 Ill. 386, 23 N. E. 114; *Ballance v. Peoria*, 180 Ill. 29, 54 N. E. 428. Anderson defines "heir general" as "he upon whom the law casts the realty of an intestate": Anderson's Law Dictionary, 508. Bouvier defines "heir general" as "heir at common law," and defines "heir at common law" as "he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of the ancestor": 1. Bouvier's Law Dictionary, 746. Again, "heir" is defined as "one who, upon ⁶⁰³ the death of another, acquires or succeeds to his estate by right of blood and by operation of law; he upon whom the law casts the estate immediately upon the death of the ancestor": 2 Blackstone's Commentaries, 201. In the Roman law and in the modern civil law "heir" has a more extended signification than in the common law. By it the term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law: 9 Am. & Eng. Ency. of Law, 357.

Adoption of children was a thing unknown to the common law, but was a familiar practice under the Roman or civil law, and our modern statutes of adoption are taken from the latter, and so far modify the rules of common law as to the succession of property. The Illinois statute of adoption provides that "a child so adopted shall be deemed, for the purposes of inheritance by such child, . . . and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." It is not, and could not, be contended that if Adeline Gellatly had died intestate

owning property in her own right, the appellee, her adopted child, would not have succeeded to her estate, under the statute of adoption, as her "heir general." The deed in question here, in the event of the failure of the first contingency, conveys the premises therein described, not to the heirs general of the grantor, but to the "heirs generally" of the grantee, Adeline Butterfield (Gellatly), and there being no language in the deed to indicate that the grantor used the words in any but their ordinary legal signification, "heirs generally" must be held to indicate the adopted child, Roy Gellatly—the person upon whom the law, as now fixed by the legislature, has impressed the character of "heir" of Adeline Gellatly.

For the reasons indicated we think the circuit court committed no error in holding that appellee Roy Gellatly is entitled to the fee in the premises described in the ⁶⁰⁴ deed from Justin Butterfield to Adeline Butterfield, and in enjoining appellants and their cotenants from claiming any right, title, or interest in the premises, and its decree will accordingly be affirmed.

MR. JUSTICE MAGRUDER, with whom concurred Mr. Chief Justice Boggs, dissented on the ground that the deed of Justin Butterfield intentionally drew a distinction between his daughter's children and her "heirs generally." "Heirs generally" was intended to mean something else than a child, and manifestly refers to collateral heirs. Roy Gellatly, the adopted child, could not be an heir of any kind, except so far as he became such by adoption, and he could only take, if at all, as a child. "If the grantor did not intend to refer to an adopted child of his daughter as one of her children, then he could not by the same reasoning have intended to refer to such adopted child as one of her 'heirs generally.'"

ADOPTED CHILD.—THE RIGHT OF INHERITANCE of an adopted child in the estate of his adopting parents is the same as if he were a child born to them: See the monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 223. He is, in a legal sense, both the child of his natural and of his adopting parents, but he is not a bodily heir: *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635, 44 S. W. 761.

DEED.—IF THE TERMS OF A DEED ARE PLAIN and unambiguous, the court should limit its inquiry to what the words of the deed express: *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

BRADLEY v. ELY.

[24 Ind. App. 2, 56 N. E. 44.]

PARTNERSHIP — FARMING CONTRACT. — An agreement reciting that the "party of the first part has this day rented and farm let unto the party of the second part his farm for the term of one year, with the privilege of continuing the same from year to year on the terms hereinafter mentioned, and at the expiration of each year during the term of such tenancy they shall meet on proper notice, adjust their business and claims pertaining to said renting, the party of the second part to have charge of said farm and to have full power to make all necessary purchases therefor, and to buy and sell such stock, and for such price as may be mutually agreed upon, two-thirds of the net profits to go to the party of the first part, and one-third thereof to the party of the second part, and losses and expenses to be apportioned," in like manner, does not constitute a partnership, but merely a contract for compensation for services.

PARTNERSHIP. — PARTICIPATION IN PROFITS and losses of a business does not constitute a partnership, but there must be such community of interest as enables each party to make contracts, manage the business, and dispose of the whole property. This rule is the same as to third persons, unless the party sought to be charged has so acted as to lead plaintiff to believe a partnership to exist, and to act upon such belief. If one of the parties is not to receive a part of the profits in specie, but a sum of money calculated in proportion to a given quantity of the profits, then, even as to third persons, he is not a partner, but an agent or servant.

S. Stansifer and C. S. Baker, for the appellant.

M. D. Emig, G. W. Cooper, and C. B. Cooper, for the appellee.

2 COMSTOCK, J. The appellee, plaintiff below, sued James L. Hargis and James L. Bradley, as partners, as J. L.

Hargis & Co. The complaint was in two paragraphs; the first on a promissory note executed by J. L. Hargis & Co. to the appellee; the second was for money had and received to the use and benefit of the defendants, to pay off an indebtedness incurred in the operation and management of a large farm operated, as alleged, by the defendants as partners. Appellant filed his sworn answer to the complaint ³ in general denial. The finding and judgment of the court was for the appellant on the first paragraph of the complaint, and against Bradley and Hargis on the second paragraph. Bradley alone appeals. The error assigned is the action of the court in overruling appellant's motion for a new trial. Among the reasons specified in the motion for a new trial are "that the finding is not sustained by sufficient evidence, and is contrary to law." The record shows that the consideration of the note which was executed by Hargis in person was for the same money loaned to Hargis in person, and declared for in the second paragraph of the complaint.

The record shows that on the third day of January, 1880, appellant, then and still the owner of the farm in Bartholomew county, near Edinburg, mentioned in the second paragraph of the complaint, and then and still residing in the city of Indianapolis, entered into a written contract with James H. Hargis for the cultivation of the farm; that, under the contract, he (James H. Hargis) resided upon and cultivated the farm until 1890, when his son, J. L. Hargis, who for some time had acted as his father's foreman, moved on the farm, his father moving off, and during the son's occupancy and cultivation of the farm the alleged indebtedness accrued. The record shows that there was no contract for the occupancy or cultivation of the farm, written or oral, between appellant and James H. Hargis or J. L. Hargis, other than the written agreement with James H. Hargis. There is evidence that J. L. Hargis succeeded to the position and rights of his father, J. H. Hargis.

The second paragraph alleges a partnership between J. H. Hargis and the appellant. Counsel for appellee state in their brief that the court found that they were partners, and that the money was used in the discharge of indebtedness created for the benefit of the partnership. Appellee contends that the contract made the parties thereto a farm partnership. Appellant contends that it is a contract "to rent and farm let," as declared therein, and does not create ⁴

a partnership of any kind. Counsel for appellee, in support of their view, argue that Bradley furnished the farm and two-thirds of the personal property; one-third of the personal property was appraised and charged to Hargis, who, by the terms of the contract, became the owner of one-third the personal property for the purchase of which he became indebted to Bradley, and agreed to pay interest thereon; he furnished his own and hired labor; he had the power of general manager; there was to be a showing of the losses and profits; "two-thirds of the net profits to go to the party of the first part, and one-third thereof to go to the party of the second part, and the losses and expenses to be applied, two-thirds to the party of the first part and one-third to the party of the second part."

It is claimed by counsel for appellee that these terms and stipulations of the agreement made the contract one of partnership: Citing 17 Am. & Eng. Ency. of Law, 854; *Brown v. Higginbotham*, 5 Leigh, 583, 27 Am. Dec. 618; *Champion v. Bostwick*, 18 Wend. 173; *Pettee v. Appleton*, 114 Mass. 114; *Fougner v. First Nat. Bank*, 141 Ill. 124, 30 N. E. 442; *State Nat. Bank v. Butler*, 149 Ill. 575, 36 N. E. 1000. As appears from the brief of appellee, the cause was tried and decided upon the theory that Hargis and appellant were partners.

In the construction of a contract, we look to the intention of the parties. As said in *George on Partnership*, 31: "But it is the legal, rather than the declared, intention that controls. If the parties intend and do those things which the law declares constitute a partnership, then the parties are partners; and an express stipulation that they do not intend to form a partnership is of no avail. It simply shows that they have mistaken the legal effect of the agreement which they intended to make." The fact of partnership, in the case before us, depends entirely upon the written agreement. To copy it in full would unduly extend the length of this opinion. From an examination of its terms, we think it quite clear that the parties did not intend to form a partnership. ⁵ The words which are usually employed in articles embracing the formation of a partnership are wholly wanting. The intention to form a partnership is nowhere in terms expressed. Upon the contrary, the agreement recites that "the party of the first part has this day rented and farm let unto the party of the second part his [Bradley's] said farm, . . . for the term of one year, and after the first day of March, 1880, with the

privilege of continuing the same from year to year on the terms hereinafter enumerated; . . . and at the expiration of each year during the term of such tenancy . . . they shall meet on proper notice . . . adjust their business and claims pertaining to said renting." Did the parties, without intending so to do, enter into a partnership? A partnership may be thus defined: If there is a joint undertaking and community of profit and loss, each party sharing in these mutually, and having a specified interest in the profits, not as compensation for services rendered, but as an associate in the undertaking, the relation of partner is formed. George on Partnership, at page 50, says: "*Cox v. Hickman*, 8 H. L. Cas. 268, established the proposition that partners are the agents of each other, but, for reasons just explained, mutual agency is not the test of a partnership. The ultimate and conclusive test of a partnership is the co-ownership of the profits of the business. If there is community of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate. In other words, a property right in them from the start in one associate as much as in the other."

The contract provides for the purchase by the party of the second part of a one-third interest in the personal property on the farm. The remaining two-thirds interest was reserved in the party of the first part. This created a tenancy in common. It provides for the sale of the farm property on hand when the contract was entered into by "the mutual consent and agreement of the parties." The ⁶ parties were not made the mutual agents of each other, each as principal.

In *Roper v. Schaefer*, 35 Mo. App. 30, in which numerous authorities are cited, the rule stated in an instruction, as follows, was approved: "The court declares the law to be that a simple participation in the profits and losses of a business does not constitute a partnership, but there must be such a community of interests as enables each party to make contracts, manage the business, and dispose of the whole property; and this rule is the same as to third persons, unless the party sought to be charged has so acted as to lead the plaintiff to believe a partnership to exist and to act upon such belief." The contract in question provides that the party of the second part will cultivate all the farming land thereon in such crops and in such proportions as the parties may agree

upon from year to year; that he will plow and gather in good season or order, circumstances permitting, and put in a crib or garner; and the parties are to sell the product of said farm at such prices as said parties may agree upon from time to time. "The said party of the second part to have charge of said farm and to take full power to make all necessary purchases for said farm, and to buy and sell such stock and for such price as may be mutually agreed upon. The party of the second part to keep a complete and correct account of all purchases and sales of any kind and character pertaining to the management of said farm under this contract which shall be open to the inspection of both parties." These provisions are consistent with the theory of tenancy, and with the foremanship of the party of the second part, and inconsistent with the theory of partnership, because the right of a partner to inspect the books is an incident of partnership not dependent upon contract. The party of the first part is to have two-thirds of the price of all articles sold from said farm, and the party of the second part one-third thereof. The agreement stipulates that the party of the second part shall not be required to replace buildings destroyed by fire. This provision would seem wholly out of place in a partnership agreement, but the parties may reasonably have had in mind the rule that ordinarily leased premises are to be surrendered to the landlord in as good repair as when taken, ordinary decay excepted.

We are unable to agree with the learned trial court in the conclusion reached. We are of the opinion that the intention of the parties, gathered from the instrument, was not to enter into a partnership, and that without reference to their intention, as gathered from the extracts we have made from the contract descriptive of the relation intended to be created, the instrument cannot be construed as creating a partnership. The specific interest in the profits given to the tenant were in compensation for services rendered. It contains no provision inconsistent with this interpretation, while the theory of partnership is against the apparent intention of the parties. We have not found the question easy of solution. The conclusion reached cannot be said to be sustained by "an unbroken line of authorities," for in the reported cases there is confusion as to the effect of stated facts. The construction, however, adopted bears the ultimate test as announced by approved authorities, and is in

harmony with the general tenor of the instrument. We cite the following Indiana cases as in line with quotations from George on Partnership, 31, and Collyer on Partnership, 11: *Macy v. Combs*, 15 Ind. 469, 77 Am. Dec. 103; *Stumph v. Bauer*, 76 Ind. 157; *Emmons v. Newman*, 38 Ind. 372; *Keiser v. State*, 58 Ind. 379. In *Macy v. Combs*, 15 Ind. 469, 77 Am. Dec. 103, the court said: "That the parties to the agreement did not intend, as between themselves, to form a partnership, is clear; but there is much confusion, and not a little conflict, in the authorities, as to whether the facts here detailed should constitute them, in the eye of the law, partners as to third persons; although they did not so intend. The agreement has apparently one of the marked characteristics which usually enter into a partnership, in and including the ^s division of profits, namely, a share or interest in the profits: Story on Partnership, 22, 91; *Waugh v. Carver*, 2 H. Black. 235. But this must be a community of interest in the profits, and must be mutual: Story on Partnership, 22, 91; *Waugh v. Carver*, 2 H. Black. 235; Collyer on Partnership, b. 1, p. 11; and by this mutuality is meant that each party has a specific interest as a principal: Collyer on Partnership, 8-11, 14, 15. It appears also to be settled by weight of authority that even as to third persons, each party must have an interest in the profits, as profits, and not a stipulated portion of the profits as a compensation for his labor: See the decisions sustaining this collected in *Loomis v. Marshall*, 12 Conn. 69, 30 Am. Dec. 596; and to the reverse, *Ex parte Hamper*, 17 Ves. 404. Unless in cases of fraud, or where the parties (*Story on Partnership*, 78, 86), or, at least, the one sought to be charged, have held themselves out as partners to third persons. In other words, if the party is not to receive a part of the profits in specie, but a sum of money calculated in proportion to a given quantity of the profits, then, even as to third persons, he would not be a partner, but an agent or servant."

Judgment reversed, with instruction to sustain appellant's motion for a new trial.

PARTNERSHIP—FARMING CONTRACT.—Whether an agreement to work agricultural lands and share the profits or produce constitutes a contract of partnership is considered in *Reynolds v. Pool*, 84 N. C. 37, 37 Am. Rep. 607, and note. Leasing a farm by one person and placing men to work thereon by another under the former's management, upon an agreement that the net profits shall be divided between them, constitutes a partnership: *Brown v. Hig-*

ginbotham, 5 Leigh, 583, 27 Am. Dec. 618; but an agreement to raise a crop on another's land, the landlord to furnish teams and feed, the tenant to supply the labor, and the profits to be divided equally, does not constitute a partnership: Day v. Stevens, 88 N. C. 83, 43 Am. Rep. 732.

PHENIX INSURANCE COMPANY v. WALTERS.

[24 Ind. App. 87, 56 N. E. 257.]

INSURANCE — KEEPING DYNAMITE ON PREMISES.— If a policy of insurance provides that it shall be void if dynamite is kept, used, or allowed on the premises, unless otherwise provided by agreement indorsed on the policy or added thereto, and a slip is attached to the policy providing that the insurance shall cover certain articles and such other merchandise as is usually kept for sale in a retail hardware store, the policy is not avoided by reason of keeping dynamite on the premises, if it can be proved to be an article of merchandise usually kept for sale in a retail hardware store.

A. Gilchrist, C. A. De Bruler, and L. C. Embree, for the appellant.

M. W. Fields, for the appellee.

88 BLACK, J. The appellee sued the appellant, and recovered judgment upon a policy of fire insurance dated August 13, 1897. The court rendered a special finding, and the appellant excepted to the conclusions of law in favor of the appellee stated by the court. For the sake of brevity, we recite such findings as seem to relate to and illustrate the question discussed by counsel. The policy was not set out in the finding, but was referred to as filed with the complaint, thereby making it part of the finding. It consisted mostly of printed matter. Near its beginning it provided that the appellant, "in consideration of the stipulations herein named, and twenty dollars premium," insured the appellee, for the term of one year, "against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding two thousand dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit." There was a blank space across the entire face of the policy as originally printed, with fifteen vacant lines. Over this space, at the time of the execution of the policy, there was pasted a slip, containing the following: "Phenix Hardware Store Form. \$1,750 on stock of shelf and

heavy hardware, iron, steel, cutlery, stoves, nails, sporting goods, tinware, and such other merchandise as is usually kept for sale in a retail hardware store; all while contained in, etc. [describing premises], in the town of Fort Branch, state of Indiana." Here followed other items relating to other property insured, which need not be further noticed. Next came the following: "Subject to ——— clauses as per signed slips attached hereto and made part of this policy. . . . Permission to keep for sale not exceeding five barrels of kerosene oil, which shall be of not less than the U. S. standard of 110, not to be handled or sold by artificial light within the distance of fifteen feet; also twenty-five pounds of gunpowder, in close tin cases or canisters, not to be sold or handled by artificial light." Next followed a permission to use a gasoline stove for exhibition purposes, with particular stipulations and cautions⁸⁹ relating to the use of the gasoline. Then followed, at the end of the slip, the following: "Attaching to and forming part of policy No. 1,277 of the Phenix Insurance Company of Brooklyn. C. N. Victor, Agent." In the printed matter of the policy some distance below said blank space, and being a part of the skeleton form of a policy before being filled up, was the following: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises . . . dynamite, . . . gasoline, gunpowder exceeding twenty-five pounds in quantity, . . . or other explosives, . . . petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights, and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light)," etc. In a subsequent printed part of the policy was the following: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto."

The court further found as follows: "1. The plaintiff has duly performed all conditions to be performed by him in or about the policy, except as to the keeping of dynamite on the premises described in said policy under the circumstances herein-after set out. If the plaintiff is entitled to recover upon this

policy, the sum due him from the defendant thereon is two thousand dollars and interest thereon since the fifteenth day of January, 1898. 2. At the time said policy was executed and delivered to the plaintiff, and at all times thereafter, and up to the time of the fire stated in these findings, the plaintiff kept upon the premises, in the brick building described in the policy filed with the complaint, fifty pounds of dynamite.⁹⁰ Dynamite is an explosive, and its explosive force is exceedingly great and destructive. At the time of the fire which destroyed the property insured by said policy said dynamite exploded, and the explosion of the same prevented the saving of goods insured by said policy, which would have been saved at said time except for said explosion. 3. On the thirteenth day of August, 1897, and for some years prior, dynamite was the usual part of the stock of a retail hardware store in southwestern Indiana, and was an article of merchandise usually kept for sale in a retail hardware store in southern Indiana. That the defendant's agent who took the policy in suit, Charles Victor, and the defendant company did not have actual knowledge that dynamite was a part of plaintiff's stock of hardware at the time of the execution of the policy sued on."

Counsel for appellant suggest for our consideration the question whether or not the fact that the description of the property insured includes "such other merchandise as is usually kept for sale in a retail hardware store," and the fact that dynamite "was the usual part of the stock of a hardware store in southwestern Indiana [where the store in question was situated], and was an article of merchandise usually kept for sale in a retail hardware store in southern Indiana," overcome the provision of the policy that it shall be void unless otherwise provided by agreement indorsed thereon or added thereto, "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises . . . dynamite," etc.

In the beginning of the policy was the stipulation for insurance against all direct loss or damage by fire, except as afterward in the policy provided, to an amount not exceeding a specified sum, upon the property described in the slip attached in the blank space. This exception related to all subsequent provisions of the policy qualifying the otherwise absolute agreement to insure against such loss or damage. To determine how far in any particular this qualification⁹¹ extended, all the subsequent provisions bearing upon the mat-

ter are to be considered together, and they are to be harmonized so far as the rules of construction applicable to policies of insurance will allow. All the property described in the attached slip must be regarded as covered by the insurance, unless in the slip itself or some subsequent part of the policy there is a controlling exception of some part of such property from the insurance.

The subsequent clause of the printed form relied upon as rendering the policy void because of the keeping of dynamite on the premises does not provide that the policy shall be void absolutely if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed dynamite on the premises; but it provides that, notwithstanding any usage or custom of trade or manufacture of keeping, using, or allowing dynamite on the premises, the keeping, using, or allowing of dynamite on the premises shall render the policy void, unless otherwise provided by agreement indorsed on or added to the policy. This is an express direction to look to the matter contained in the attached slips, and if, by reasonable construction of the contents thereof, considered separately, it appears that permission is thereby given to keep, use, or allow dynamite on the premises, the policy will not be rendered void by the exercise of such privilege. If, by the terms of the attached slip, dynamite be included in the property insured upon the premises, then, of course, it will not render the policy void to keep dynamite on the premises. The property described in the slip, besides certain particularly specified kinds, was also "such other merchandise as is usually kept for sale in a retail hardware store"—all while contained in the certain hardware store described, in the particular locality named. What other merchandise was thus included could not be known judicially from a mere examination of the written instrument, but was a question to be determined upon evidence showing whether or not dynamite was usually kept for ⁹² sale in retail hardware stores in the region where this store was located. It was a question of fact.

The matter for decision is not one involving a question merely as to an implied permission arising from a necessity or a usage or custom in a permitted trade or manufacture, authorizing the keeping of an article excepted or forbidden by the general provisions of the policy; but here the description of the property inserted in the policy at the time of its execu-

tion, by means of a slip, which by the terms of the policy is to have controlling effect, expressly embraces dynamite, if it can be proved to be an article of merchandise usually kept for sale in a retail hardware store.

The adjudicated cases involving the construction of policies with various shades of verbal differences, and the comments of text-writers, sustain sufficiently the conclusion which we have thus reached. We need not do more than cite the following: Wood on Insurance, secs. 64, 206; May on Insurance, secs. 233-239; Whitmarsh v. Conway etc. Ins. Co., 16 Gray, 359, 77 Am. Dec. 414; Pindar v. Kings County Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544; Steinbach v. La Fayette Ins. Co., 54 N. Y. 90; Hall v. Insurance Co., 58 N. Y. 292, 17 Am. Rep. 255; Maril v. Connecticut Ins. Co., 95 Ga. 604, 51 Am. St. Rep. 102, 23 S. E. 463; Niagara Ins. Co. v. De Graff, 12 Mich. 124; Carrigan v. Lycoming Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Collins v. Farmville etc. Ins. Co., 79 N. C. 279, 28 Am. Rep. 322; Phenix Ins. Co. v. Taylor, 5 Minn. 492; Faust v. American Ins. Co., 91 Wis. 158, 51 Am. St. Rep. 876, 64 N. W. 883; Stout v. Commercial Union Assur. Co., 11 Biss. 309, 12 Fed. 554; Harper v. Albany Ins. Co., 17 N. Y. 194; Fraim v. National Ins. Co., 170 Pa. St. 151, 50 Am. St. Rep. 753, 32 Atl. 613; Carlin v. Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440; Archer v. Merchants' Ins. Co., 43 Mo. 434; Viele v. Germania Ins. Co., 26 Iowa, 9, 66, 96 Am. Dec. 83; Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485.

What we have said seems sufficient to cover all matters discussed by counsel. The judgment is affirmed.

INSURANCE—PROHIBITED ARTICLES.—A recovery may be had on a policy of fire insurance which stipulates against the keeping and use of certain inflammable substances, if the business insured is of such a nature that some of such substances constituted component parts of the stock of materials used in such business: Maril v. Connecticut Fire Ins. Co., 95 Ga. 604, 51 Am. St. Rep. 102, 23 S. E. 463. The keeping of hazardous or prohibited articles does not avoid a policy of insurance, if they are articles usually kept for sale in the insured store: Whitmarsh v. Conway Fire Ins. Co., 16 Gray, 359, 77 Am. Dec. 414.

SUPREME TRIBE OF BEN HUR v. HALL.

[24 Ind. App. 316, 56 N. E. 780.]

PLEADING—DEFECT OF PARTIES.—The question of defect of parties cannot be raised by demurrer for want of facts.

INSURANCE — BENEFIT ASSOCIATIONS — FORFEITURE—WAIVER.—Forfeiture of insurance in a mutual benefit association on account of nonpayment of dues may be waived by demanding and receiving such dues after the death of the insured with knowledge of his death.

INSURANCE—FORFEITURE—PLEADING.—A reply to an answer setting up a forfeiture of insurance in a mutual benefit association for nonpayment of dues, alleging that the association, by its local officer, demanded and received such dues after the death of the member, is not a departure from the cause of action stated in the complaint alleging the authority of such local officer to collect such dues.

INSURANCE — BENEFIT ASSOCIATIONS — AGENTS. — A local officer of a benefit association, required by its by-laws to collect dues from members, is the agent of the association, and a member discharges his obligation to the association when he pays his dues to such agent. He has a right to rely upon their proper application.

INSURANCE—BENEFIT ASSOCIATIONS—PAYMENT OF DUES—EVIDENCE.—In an action on a policy of insurance in a mutual benefit association, evidence that the insured had access to a safe with permission to use the money therein is admissible on the issue of the nonpayment of his dues.

APPELLATE PRACTICE.—FAILURE OF AN ASSIGNEE of an insurance policy to introduce in evidence an assignment upon which the right to recover part of the insurance is based cannot be reviewed on appeal if the amount of recovery is not assigned as cause for a new trial.

M. W. Bruner and S. A. Hays, for the appellant.

A. Payne and S. D. Coffey, for the appellee.

317 COMSTOCK, J. This was an action by appellee against appellant upon a certificate of membership issued by appellant to Odo St. C. Hall, husband of appellee, for the benefit of appellee and Sarah J. Hall, mother of said member, in the sum of two thousand five hundred dollars.

The complaint was in four paragraphs. The first paragraph alleges issuance of certificate for two thousand five hundred dollars to Odo St. C. Hall on March 2, 1896, in consideration of payment of one dollar on the first day of each month; that that sum was duly paid each month; that Odo St. C. Hall died on August 25, 1896, in good standing; that said Odo St. C. Hall performed all the conditions of the contract on his part, and violated none of the provisions thereof. Facts are

then alleged showing waiver of proofs of death, and that Sarah J. Hall assigned her interest in said certificate to appellee.

The second paragraph is different from the first only in the allegations as to payment of dues. As to the payment of dues it alleges payment for March, April, and June; that the member died August 25, 1896; and that, after his death, the appellant demanded, received, and retained the dues for May, July, and August, and then alleges the assignment of the certificate.

The third paragraph differs from the first and second in that it alleges that deceased paid his March dues on the ³¹⁸ 25th, his April dues on the 21st, his May dues on the 19th, and his June dues on the 20th; that, notwithstanding deceased had paid his dues for June, appellant marked him as suspended on its books for nonpayment of the same; that deceased died in the month of August, prior to the time the monthly installment fell due for that month; that, after Hall's death, dues were collected and retained; and then alleges the assignment of the certificate to her.

The fourth paragraph differs from the first, second, and third in that it alleges a custom established by appellant with the local court and its members to accept the dues whenever convenient for members to pay, whereby said deceased was led to believe that it was not necessary to make payments on the days when due; that he paid March dues on the 25th; April dues on the 21st; May dues on the 19th, and June dues on the 20th; that on the 25th of August Hall died, without having paid his dues for July and August; that, after Hall's death, the scribe of the local court demanded, received, and retained dues for July and August; and alleges assignment of certificate to her.

To these several paragraphs of complaint a demurrer was filed and overruled, to each of which rulings exception was taken. The appellant then answered in two paragraphs. The first paragraph sets out various sections in the by-laws relating to payment of dues. Section 53 of the by-laws provides:

"Sec. 53. A monthly payment shall be due from each beneficiary member on the first day of each and every month, and must be paid on or before the twenty-fifth day of the month in which the same becomes due, without notice, to the scribe of his or her court, or to some one duly authorized by the supreme tribe prior to the institution of a court; and whenever, in the judgment of the tribune, one monthly pay-

ment is not adequate to the benefit demands, additional monthly payments may be ordered and published in the official organ or notice of the supreme tribe, and such additional payments must be paid on or before the twenty-fifth day of ³¹⁹ the month in which the payments were levied; provided, however, that no extra monthly payments shall be called for while the regular monthly payments, together with the surplus fund, are sufficient to meet the benefit demands, and that not more than one extra payment can be called for in any one month; provided, further, that certificates dated after the 15th of the month shall not be liable for the regular monthly payment for the month in which they were issued. All payments must be remitted to the supreme scribe not later than the twenty-eighth day of the month for which payment is made, so that the member shall have credit on the books of the supreme scribe at least by the first day of the month following the month for which the payment was made."

Section 54 of the by-laws provides: "Penalty for Nonpayment.—A member failing to pay any payment within the time prescribed in the foregoing section shall forfeit all rights and benefits in the benefit and reserve funds, and shall stand suspended from beneficiary membership in the order; provided, however, that if any such suspended member shall pay his or her monthly payment, so that such suspended member shall have credit on the books of the supreme tribe on or before the tenth day of the month following that for which he or she was suspended, no certificate of health will be required; and such suspended member may be required by the court to pay the cost of transmitting such payment to the supreme tribe, as in all cases cost of remittance must be borne by courts; but, if not paid on or before the tenth day of the month, as before stated, then the member shall furnish to the scribe of his or her court a certificate of health, stating that he or she is in as good health as when the certificate was issued; provided, however, that if any payment is not made within the month following that for which the member was suspended, then the member must furnish a certificate from the examining physician showing him or her to be in good health, and free ³²⁰ from disease, which certificate must be accompanied by the amount of the payments for which the member was suspended, together with all other payments and fees that may have accrued."

The answer further alleges that it is provided in the application of Hall for membership that: "Neglect to pay any monthly payment, assessment, or per capita tax which shall be made by the supreme tribe within the time provided by the laws thereof, or neglect to pay the dues fixed by the said laws in the manner and at the time provided for in such laws or the by-laws of the court to which I belong, shall vitiate my beneficiary certificate, and forfeit all payments made thereon. I hereby agree that as monthly payments and assessments invariably fall due on the first day of the month, that no notice thereof is necessary, and it is my duty to pay the same on or before the twenty-fifth day of the month without notice. I hereby waive all claim or right to such notices or of their delivery through the mails or otherwise."

The answer alleges, in addition, that deceased failed to pay his dues for June, July, and August; that after the death of the decedent, to wit, August 26th, the scribe of the local court met the father of decedent, and informed him of such delinquency; that said father thereupon proposed to pay such delinquency, and insisted on paying the same, without any solicitation on the part of said scribe; that said scribe took said dues, forwarded same to appellant, who received same on August 27th; that appellant immediately, on said day, notified said scribe that deceased was a suspended member, and that it would be necessary to furnish a health certificate before he could be restored to good standing; that on September 2d, said scribe notified appellant of the death of decedent, and thereupon appellant returned the money received as dues, and that said money has never since been in its possession.

The second paragraph of answer was a general denial. To the first paragraph of answer appellee replied in two ³²¹ paragraphs, the first of which was a general denial. The second paragraph of reply alleged that deceased paid all dues as the same matured, and died August 25th, within the time allowed for payment of dues for August, and that on August 26th the father of the decedent paid the dues for that month. To this reply a demurrer was filed, and overruled, to which ruling the appellant excepted. There was a trial by the court, and a general finding and judgment for appellee.

The errors assigned are: 1. The action of the court in overruling the demurrer to the first paragraph of complaint; 2. In overruling the demurrer to the second paragraph of complaint; 3. In overruling the demurrer to the third paragraph

of complaint; 4. In overruling the demurrer to the fourth paragraph of complaint; 5. In overruling the demurrer to the second paragraph of reply; 6. In overruling appellant's motion for a new trial.

Counsel for appellee claim that it affirmatively appears from the record that the judgment of the court was rendered upon the first paragraph of the complaint, and that it is, therefore, unnecessary to consider the other paragraphs. We cannot say that the record supports this claim.

The only objection pointed out to the first paragraph of the complaint is that a written assignment, or a copy thereof, of the interest of Sarah J. Hall to appellee was not filed therewith. Where a suit is based upon a written instrument, it is necessary to set out a copy with the pleading. This is not a suit on the assignment of the policy, but upon the policy. The demurrer to the complaint was upon the ground that it did not state facts sufficient to constitute a cause of action. Defect of parties arising on an assignment can only be raised by demurrer assigning such defect for cause: *Dunn v. Lonsey*, 80 Ind. 288; *Whipperman v. Dunn*, 124 Ind. 349, 24 N. E. 166, 1045.

The second paragraph of the complaint shows that the ³²² dues provided for were not paid for the months of July and August, but seeks to show a waiver to rely on such nonpayment by alleging that appellant, after the death of the insured member, demanded and received the dues for said months with knowledge of such death. To give more fully the averments of the second paragraph, it is alleged that, by the terms of its by-laws, the courts organized and chartered by the defendant and its officers are the sole agents for the defendant for the collection and transmission of all moneys from the members of such courts, fully empowered by the defendant to collect the per capita tax and the monthly installments of dues for insurance; that under the by-laws of the defendant the scribes of such courts are fully authorized and empowered to collect all money due the defendant, and transmit the same to the supreme tribe; that at the time the insured became a member of William Y. Allen Court he paid his initiation fee of seven dollars and fifty cents; that on the twenty-fifth day of March, 1896, he paid to the scribe of said court one dollar, the dues for March of that year; that on the twenty-first day of April he paid said scribe one dollar, the dues for April; that on the twentieth day of June he paid said scribe one

dollar and seventy-five cents, the amount due on his certificate for June and the per capita tax for the period of six months; that he died on the 25th of August, 1896, of which fact the defendant had due notice within a few days thereafter; that upon his death the defendant claimed he was in arrears in his monthly payments on his certificate of insurance for the months of May, July, and August, 1896, and demanded payment thereof; that upon such demand the father of the insured, for the benefit of the appellee and Sarah J. Hall, who was his wife, paid the same; that said defendant demanded, received, accepted, and still retains said money, with a full knowledge of the fact that said Hall was dead at the time of the payment of the same.

Counsel for appellant insist that it is beyond the power of the officer of an association such as appellant to revive ³²³ the liability of the association after death of the member. The appellant being a mutual fraternal order, its officers could not waive a forfeiture created by nonpayment of such dues: Citing Supreme Council etc. v. Boyle, 10 Ind. App. 301, 37 N. E. 1105. The question presented, we think, is one of forfeiture purely, and it has been held in many cases in this and the supreme court that forfeitures for the benefit of the insurer may be waived: Masonic etc. Assn. v. Beck, 77 Ind. 203, 40 Am. Rep. 295; Farmers' etc. Assn. v. Koontz, 4 Ind. App. 538, 30 N. E. 145; Sweetser v. Odd Fellows etc. Assn., 117 Ind. 97, 19 N. E. 722; Michigan Mut. Ins. Co. v. Custer, 128 Ind. 25, 27 N. E. 124; Marshall etc. Ins. Co. v. Liggett, 16 Ind. App. 598, 45 N. E. 1062.

In Masonic etc. Assn. v. Beck, 77 Ind. 203, 40 Am. Rep. 295, Wood, J., speaking for the court, said: "There is no reason why this waiver may not occur after, as well as before, the death of the person whose life was insured."

In Richards on Insurance, page 80, the author says: "The tendency among the courts seems to be to deny the distinction between mutual and stock companies altogether, in respect to the power of the officers and agents to waive conditions and estop the company from insisting upon forfeitures; for, as a matter of fact, the applicant for insurance rarely knows anything about the charter or by-laws, and could hardly be expected to be acquainted with them at the time of making his application. Universally, it is held that the acceptance of an assessment or premium by the home office is a waiver by the company of all former grounds of forfeiture known by it."

In *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51, 5 South. 116, it is said: "On breach of the condition and forfeiture of insurance, the defendant had the election to avoid the policy, or waive its right to claim the forfeiture. Conditions in a policy of insurance, limiting or avoiding liability, are strictly construed against the insurer, and liberally in favor of the assured. Though a waiver may be in the nature of an estoppel, and maintained on similar principles, ³²⁴ they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations, insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture." To the same effect is *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

The third paragraph of the complaint sets up substantially the same facts as the second. The court properly overruled the demurrer to each of them.

The fourth paragraph pleads an estoppel or waiver by custom of the appellant to receive overdue assessments or dues. The allegation as to custom is as follows: "That by the laws of said defendant the amount to be paid on certificates of insurance falls due on the first day of each month, but by the custom of said defendant with William Y. Allen Court No. 75 the members thereof were not required to pay the same on the day it became due, but, on the contrary, they were permitted to pay the same at such times as suited their ability or convenience. It was the custom of the defendant to receive and accept the amount so due on said certificates when paid, whereby the said Hall was led to believe, and did believe, that, in order to keep alive the said certificate it was not necessary to pay the amount due thereon the day the same fell due." The fourth paragraph then alleges payments for March, April, May, and June, 1896, after the first day of the month; that the member died August 25, 1896, without having paid the dues for July and August, 1896, and that after the death of the member appellant demanded, received, and retained the dues for July and August.

It is claimed that the allegations in this paragraph fail to ³²⁵ establish the custom with the decedent to receive overdue assessments. It is insisted that the custom is established with the William Y. Allen Court No. 75, and not with the decedent; that it does not allege a usage amounting to a custom between appellant and the decedent. We are of the opinion that this paragraph is fairly within the rule laid down in *Sweetser v. Odd Fellows etc. Assn.*, 117 Ind. 97, 19 N. E. 722; but it also alleges that appellant, with full knowledge of the facts, received and retained the overdue assessments.

Counsel for appellant next discuss the action of the court in overruling its demurrer to the second paragraph of the reply. The answer to the complaint sets out the by-laws of appellant, and also the provisions of the application requiring all dues to be paid on the first day of each month, and that, if same were not paid by the twenty-fifth day of each month, the member should stand suspended, and that, if his dues were not paid and received at the head office on or before the tenth day of the succeeding month, then such suspended member shall furnish the scribe of his or her court a certificate of health stating that he or she is in as good health as when the certificate was issued; that the deceased failed to pay dues for June, July, and August, 1896, and died August 25, 1896, without having paid the same. The second paragraph of reply alleges that deceased "fully paid all sums due the defendant for the months of June and July, 1896, and had until and including the 25th of August, 1896, to pay the sum due for that month; that about 3 o'clock P. M. of said twenty-fifth day of August, he was stricken by disease, and immediately thereafter became unconscious, and died at 7:30 P. M. on said day; that on the twenty-sixth day of August, 1896, the defendant demanded of the father of said Hall the amount due for said month of August, which he then and there paid; that the defendant accepted said money, and still retains the same." A demurrer for want of facts was overruled to this reply. It is claimed that this paragraph is bad for two ³²⁶ reasons: 1. It admits that the August dues were not paid within the time permitted by the by-laws, but were paid after such time, and after the death of the member; 2. That the reply is a departure from the cause of action stated in the complaint. The appellant answers that the certificate is forfeited by reason of the nonpayment of the dues for June, July, and August. Appellee replies that, as to the months of June and July, the in-

sured, in his lifetime, paid the assessments; that as an excuse for the nonpayment for August on the twenty-fifth day of that month it is alleged that on that day, about 3 o'clock P. M., before the close of business hours, the insured was stricken by disease, and immediately became unconscious, and died at 7:30 o'clock P. M. of the same day. The insured had until and including the twenty-fifth day of August, 1896, to pay the August dues, before the time had elapsed given him under the by-laws of the society to make the payment. He was not in arrears until the end of the twenty-fifth day of August, 1896, and after that date, to wit, on the twenty-sixth day of August, 1896, appellant waived said forfeiture by demanding, collecting, and retaining the dues for that month from the father of the insured in behalf of the beneficiary. Under the allegations of the reply, the authority of any particular officer to receive an assessment in arrears does not necessarily arise, as it is averred that the appellant demanded and received these overdue assessments. By the averments of the complaint it appears that the local scribe, to whom the assessments were paid, was, by the by-laws of the society, the financial secretary of the court, and authorized to collect and receive and transmit all dues owing to appellant. The reply was not a departure from the cause of action stated in the complaint. It shows a legal reason why the cause of action as stated in the complaint should not be defeated on account of the averments of the answer. This view is sustained by *Sweetser v. Odd Fellows etc. Assn.*, 117 Ind. 97, 100, 19 N. E. 722.

Counsel for appellant next discuss the action of the court **327** in overruling appellant's motion for a new trial. The first and second reasons for a new trial are, respectively: 1. The decision of the court is not sustained by sufficient evidence; 2. The decision of the court is contrary to law. These reasons may be considered together. The undisputed facts are as follows: Odo St. C. Hall died at Terre Haute, Indiana, on the 25th of August, 1896. The next day, August 26, 1896, his remains were brought to Rockville, Indiana. On the same day, F. M. Hall, the father of the decedent, paid to Ernest O'Haver, scribe of the local court at Rockville (the William Y. Allen Court No. 75), the sum of three dollars to pay the assessments due from Odo St. C. Hall on his certificate of insurance in the defendant order. The monthly payment for August, 1896, was not paid to the scribe until after the death of the insured. The three dollars paid to the scribe of the local court at Rock-

ville was received by the supreme scribe at Crawfordsville, Indiana, on the 27th of August, 1896. At the time of its receipt, the death of Hall was not known to the supreme tribe. Upon learning of the death of the insured, the supreme tribe returned the money to the scribe of the local court, directing him to pay it to the person from whom it had been received. The local scribe still has the money. There was no averment that the dues for July and August were paid to the supreme tribe until after the death of decedent, although there is evidence tending to show that the dues for July—in fact, all dues excepting those for the month of August—were paid to the local scribe prior to the death of the insured. Counsel for appellant claim that O'Haver was the agent of the members of his court, and not of the supreme tribe, and the money having been returned to him as soon as the death of the insured was known to the defendant, such payment was as to it a nullity. Under the by-laws of the defendant, the local scribe is charged with the duty of collecting all dues from members of the court, and transmitting them to the supreme tribe. Dues from the members are payable only to local scribes. It is not ³²⁸ claimed that there is any provision in the by-laws for forfeiting membership because the local scribe should fail to remit dues when paid him. It is true that section 96 of the by-laws, after designating the officers of the subordinate courts, concludes: "These officers, when duly qualified and installed, are the agents of the members of this court and are not for any purpose agents of the supreme tribe." The duties of an officer determine the question of his agency, and not what he may be called. He is the agent of the supreme tribe for doing what its by-laws require him to do as between the members of the order and the supreme tribe: Supreme Council etc. *v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105; *Howe v. Provident Fund Soc.*, 7 Ind. App. 586, 34 N. E. 830; *Germania Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082. A member has discharged his obligation when he pays to the only person authorized to receive them his dues. He has the right to rely upon their proper application.

Two additional errors are claimed as set out in the motion for a new trial as causes third and fourth. The court allowed F. M. Hall, a witness for plaintiff, to testify that the deceased had access to his safe, where witness kept his money, and that the deceased could have had the money out of that safe, and that he had permission to use the money of the wit-

ness. The defendant objected to this testimony, for the reason that it had no tendency to prove that the deceased had actually paid his dues. The mere fact that he had access to the money and the permission to use the same is certainly no proof that he paid any of it to the scribe. Yet the payment was in issue, and any circumstance which tended to make the proposition of payment either more or less probable was relevant: *Morgan v. Weir*, 119 Ind. 178, 21 N. E. 656.

Counsel for appellant, referring to the fact that the right of appellee to recover as to one-half of the certificate is based on an alleged assignment of the certificate to her by Sarah J. Hall, one of the beneficiaries named in the policy, make the point that this assignment was never put ³²⁹ in evidence. The record of evidence pertinent to this question is as follows: "The plaintiff offered in evidence the certificate of insurance as follows, to wit." The certificate then follows. Immediately following the certificate, in the body of the typewritten report of the evidence, is the following:

"Slips attached to read as follows:

"For value received, I, Sarah J. Hall, of Rockville, Indiana, do hereby transfer and set over all my rights, title, and interest in the attached life policy to Kate M. Hall, of the city of Brazil, Indiana, this December 22, 1896. her

"Attest: ALBERT PAYNE. SARAH J. (X) HALL."
mark

Upon the face of the record, it thus appears to have been read. But, if it had not been read in evidence, the point made would be of no avail. This evidence would only go to the amount of the recovery to which appellee was entitled without the assignment of one-half of the certificate. The motion for a new trial was not because the damages were excessive or the recovery too large—the assignments by which the amount of the recovery would have been presented. The question raised by this objection is not, therefore, presented.

While there is a conflict in the testimony as to the payment of dues, there is evidence tending to show that the insured, in his lifetime, paid all dues and assessments except the assessment for the month of August; and as we cannot, under the rule governing appellate courts, weigh the evidence, it remains only to determine upon the merits of the controversy the status of the policy at the time of the death of the insured, and the effect of the payment of the August assessment after death.

It is insisted by counsel for appellant that, the insured having failed to pay the assessment on the twenty-fifth day of August, all rights by virtue of the policy in his favor ceased; that sickness, nor the fact that he was unconscious during the last few hours of his life, nor physical or financial inability, nor the payment in behalf of the beneficiaries by a ³³⁰ third party the day after his death, the money not having been received and retained by the supreme tribe with knowledge of his death upon its part, could renew a policy which had become of no effect. Many authorities are cited by counsel in support of this position. We do not deem it necessary to refer to them, for the reason that the certificate was in force at the time of the death of the insured. He was not in default until 12 o'clock midnight of the 25th of August. He was no more in default until the end of the 25th of August than he was on the second day of August. For the sake of the argument, it may be conceded that the payment on the day following his death did not revive the policy, and that the money paid to the local scribe, not having been accepted by the supreme tribe, did not work a waiver of the forfeiture; still, the policy being in force when the liability attached, the subsequent nonpayment of the August assessment would not affect the interests of the beneficiaries. Nor could the fact that the supreme tribe had entered upon its records the suspension of the assured for the reason that his dues and assessments for a previous month had not been received work such suspension, if in fact the insured had paid such dues to the local scribe, the only person to whom he was authorized to pay them under the by-laws, although such scribe had not, in the discharge of his duty, transmitted the same to the supreme tribe. When the insured died there was owing the defendant the August assessment, but he was not in default. From the sum payable to the beneficiary the defendant would have the right to retain the amount of that assessment from the sum payable by the terms of the certificate.

We find no error for which the judgment should be reversed. Judgment affirmed.

INSURANCE, LIFE.—THE RECEIPT OF AN OVERDUE PREMIUM by the agent of a life insurance company, and the acceptance thereof by the company, is a waiver of the condition of forfeiture for nonpayment of a premium when due: *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; and the demand and receipt of assessments by the insurer after the death of

the insured, with the knowledge of his death and that the contract was voidable on account of his misrepresentations, waives the forfeiture: *Masonic etc. Assn. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295. See, too, *Stylov v. Wisconsin etc. Ins. Co.*, 69 Wis. 224, 2 Am. St. Rep. 738, 34 N. W. 141.

INSURANCE, MUTUAL LIFE.—ON FEATURES of the law especially applicable to mutual or membership life insurance, see the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 543-579.

HUFF v. CHICAGO, INDIANAPOLIS, AND LOUISVILLE RAILROAD COMPANY.

[24 Ind. App. 492, 56 N. E. 932.]

NEGLIGENCE—WILLFULNESS—ACTS OF EMPLOYÉS.—If a locomotive engineer, in operating his engine, runs it at a higher rate of speed than that allowed by a city ordinance, and neglects his duty in giving required signals at crossings, such acts of negligence do not constitute willfulness or wantonness on his part.

NEGLIGENCE—WILLFULNESS—INTENT—ACTS OF EMPLOYÉS.—Before "willful" negligence can be attributed to servants or employés in the operation of a train of cars, facts must be averred and proved that will charge them with knowledge, actual or imputed, of impending danger, and until then no duty of the railroad company arises, requiring of it affirmative acts or effort to avoid resulting injury.

M. F. Dunn and G. O. Iseminger, for the appellant.

E. C. Field and W. S. Kinnan, for the appellee.

493 WILEY, C. J. The only question presented by the record is the action of the court in rendering judgment for appellee upon the answers to interrogatories notwithstanding the general verdict. Appellant was plaintiff, and brought his action to recover damages for the killing of his son. The complaint is in two paragraphs, but, as is shown by an answer to an interrogatory, the verdict of the jury rested upon the second paragraph. The first paragraph alleged a negligent killing, while the second charged the acts complained of as being done willfully and wantonly. As we are only asked to review the action of the court in rendering judgment in favor of appellee upon the answers to interrogatories, a very brief statement of the facts charged in the second paragraph of complaint will suffice.

It is averred that appellee's track crosses Seventeenth street in the city of Bedford; that said street crossing was much used,

frequented, and traveled by pedestrians and teams; that the train that killed appellant's son was approaching the crossing from the south; that south of the crossing there was an acute curve in the track; that from the direction from which the train was coming the view was obstructed by buildings, etc., and that the noise of an approaching train could only be heard for a short distance from the crossing; that the train was running at the rate of thirty miles per hour; that there was "no man on the lookout" to ring the bell and sound the whistle; that there was no headlight burning on the locomotive; that the city ordinance required the ringing of the bell, sounding of the whistle, and limited the speed of trains to eight miles ⁴⁹⁴ per hour. It is averred that the accident occurred at 5:30 P. M. of November 22, 1897, and that the obstructions at the crossing were such that the decedent could neither hear nor see the approaching train; also, that appellee's servants in charge of the locomotive did not ring the bell or sound the whistle; that these acts of the servants were acts of willfulness, and that said servants "purposely, wantonly, and willfully run said locomotive engine and permitted it to run onto, upon, and against plaintiff's decedent, . . . with great force and violence, . . . mangling and mortally wounding him," etc. The issues were joined by an answer in denial.

The facts found specially by the jury are, in substance, as follows: That the crossing where the accident occurred was "much used and frequented by the public"; that there was nothing to prevent the engineer from seeing appellant's son but darkness; that the engineer nor any other person was on the "lookout"; that the engineer did not see the decedent before the engine struck him; that the engine was running fifteen miles an hour; that the rate of speed was in violation of an ordinance of the city of Bedford; that the engineer could have seen decedent thirty feet from the cab of the engine; that, after coming within seeing distance of decedent, the engineer could not have checked the engine so as to avoid the injury; that decedent was struck on the north side of the Seventeenth street crossing; that decedent was killed while on appellee's track for the purpose of walking southward on said track to his home; that the bell was not rung nor the whistle sounded before the engine reached the crossing; that the headlight was not burning; that appellee's track south of the crossing is not straight.

It is charged in the second paragraph that the obstructions at and near the crossing were such that the decedent could neither hear nor see the approaching train. The jury disposed of this allegation by its answers to the following interrogatories: "14. From a point twenty feet east of defendant's track on the north side of Seventeenth street, was ⁴⁹⁵ there any obstruction between said point and the track to prevent a person from seeing to the southward along said track for about seven hundred and fifty feet? A. No. 15. From a point twenty feet east of defendant's railroad track on the north side of Seventeenth street, and from said point up to the track, was there any obstruction to prevent a person from seeing to the southward along said track for a distance of about six hundred feet? A. No. 16. Did the decedent approach said track from the east thereof? A. Yes. . . . 18. If the decedent had looked southward in the direction of the approaching train, could he have seen it approaching six hundred feet southward from said crossing from any point east of its track within a distance of twenty feet? A. He could in daylight. . . . 21. If the decedent had looked in the direction of the approaching engine, how far could he have seen said engine to the southward of said crossing when he was fifteen feet from said crossing? A. About one hundred feet. . . . 24. If the decedent had looked in the direction of the approaching engine before he entered upon the track, could he have seen it? A. Yes. . . . 29. From a point fifteen feet east of defendant's track at said street crossing, and while the decedent was walking from said point to the track, could he have heard the noise made by the approaching engine if he had listened attentively for the purpose? A. Yes." As to whether appellant's son looked and listened for an approaching train, as to whether there was any noise in the vicinity to keep him from hearing, and as to his familiarity with the crossing, are disposed of by the following interrogatories and answers: "32. Is there any evidence that the decedent looked in the direction of the approaching engine for the purpose of ascertaining if a train or engine was coming at any time before he entered upon said track? A. No. . . . 34. Was there any loud noise in the vicinity of said crossing to prevent a person from hearing the approach of said train, if he had listened attentively for that purpose when the decedent was approaching said ⁴⁹⁶ crossing? A. No. . . . 46. Was the decedent familiar with said crossing, and had he been familiar with said

crossing for several years? A. Yes." The jury further found that the engineer in charge of the engine did not know that decedent was on the track or in dangerous proximity thereto before he was killed, and that he was within four days of being nineteen years old. Upon these facts, we are asked to declare that appellant's son was wantonly and willfully killed by appellee's servants while operating the locomotive engine.

In an extended brief, counsel for appellant have called our attention to but one case, *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, to support their contention, and that case, as we shall show later in the opinion, is directly contrary to the theory upon which it is sought to hold appellee liable. The controlling question in this case is this: If a locomotive engineer, in operating his engine upon a railroad track, runs it at a higher rate of speed than that allowed by an ordinance of a city, and if he neglects his duty in giving the required signals, by failing to ring the bell and sound the whistle, do such acts of negligence constitute willfulness or wantonness? As to what constitutes in law "willfulness," as applied to the character of the acts here complained of, is no longer a matter of doubt or speculation, for its exact meaning has often been defined by the courts. In the case of *Dull v. Cleveland etc. R. Co.*, 21 Ind. App. 571, 52 N. E. 1013, the question was under discussion, and many authorities cited. It was there held, in harmony with the authorities, that "willful" means obstinately, stubbornly, with design, and with a set purpose. "Willfulness" arises from the spontaneous action of the will, and cannot exist without purpose or design. A willful act is one committed with an evil intent. Any extended discussion as to what will constitute willfulness is unnecessary, and we content ourselves by referring to the case last above cited and the authorities cited therein: See, also, *Miller v. Miller*, 17 Ind. 497 App. 605, 47 N. E. 338. It is here sought to impute willfulness to the acts of appellee's servants in operating the locomotive engine in the absence of any fact indicating a purpose or intent on their part to inflict the injury resulting in the death of appellant's son, and in the face of the affirmative fact that the engineer in charge of the engine did not know that the injured party was on the track or in dangerous proximity thereto. In our judgment, the facts specially found do not show a willful killing, nor can such willful killing be reasonably inferred therefrom. This conclusion is amply supported by the authorities.

In the case of *Sherfey v. Evansville etc. Ry. Co.*, 121 Ind. 427, 23 N. E. 273, appellant's decedent was killed by appellee's train of cars while walking upon a street. It was alleged that the killing was unlawful and willful, and the acts complained of as constituting willfulness were that appellee's servants were running the train through a city at a high and dangerous rate of speed, and by increasing its speed as it approached the decedent, without ringing the bell, in violation of a city ordinance, etc. It is stated by the court in the opinion that there was no averment in the complaint that the appellee or its servants knew decedent was upon the track or street. The court, by Olds, J., said: "The words 'willful,' 'careless,' and 'unlawful' are made use of, but the specific acts charged are the running of the train at a high and dangerous rate of speed without ringing the bell, in violation of a city ordinance. No facts or circumstances are averred from which it can be said the defendant had knowledge that the decedent was upon the track, or that the circumstances or use of the street was such as the act of running the train in the manner charged constituted a reckless disregard of human life, or that injury would even probably result to some person by such acts of negligence." True, what the court there said had reference to the complaint, and the distinction was made between negligence and willfulness. 498 It was held that, while the complaint showed actionable negligence, it did not show an aggressive wrong within the meaning of the term "willful," and hence did not charge a willful killing. *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, is in point. There decedent was killed while passing through a narrow archway built by the railroad on its own grounds. This archway was used for passing trains through, and on account of its narrowness it was exceedingly dangerous for a person to pass through while a train was being moved through it. There was no averment in the complaint that the engineer or other servant of the company knew the decedent was in the archway at the time. There were four paragraphs of complaint, the first and third of which counted upon a negligent killing, while the second and fourth charged a willful killing. Among other things, it was averred that appellee knew that persons were in the habit of passing through the archway, and that to run a car through the archway at great speed would endanger the lives of those who might be therein; that there was then an ordinance of the city (Columbus, Indi-

ana), limiting the speed of cars to four miles per hour, and requiring that some one should proceed in advance of any car moved backward within said city limits; that in disregard of the requirements of said ordinance and the situation, with its dangers, the appellee's servants caused an engine to push a box-car into said archway at the speed of twelve miles per hour, unaccompanied by any person, without knowledge or warning to decedent, etc. Each paragraph contained substantially the same averments, except the first and third charged the acts to be careless and negligent, and averred that the decedent was without fault, while the second and fourth paragraphs characterized the acts as being willfully done. In applying the law to the facts thus pleaded, the court said: "It is conceded by appellant's learned counsel that the specific facts alleged control in the construction of the complaint, and that the detached phrases, epithets, and conclusions cannot prevail ⁴⁹⁹ against the facts so alleged. It is further conceded that the failure to observe the ordinance does not constitute willfulness, and it so held in *Sherfey v. Evansville etc. Ry. Co.*, 121 Ind. 427, 23 N. E. 273." Continuing, the court said: "The exact point at issue is in the excessive speed of the car through the archway, a place of danger, without affirmative action for the protection of a possible trespasser. While conceding expressly that the same act upon an open switch would have been but negligence, it is argued that the archway gave to one therein no means of escape, and that a different rule should obtain, a rule whereby such negligence becomes an aggressive wrong. In the decision which we have quoted, the place of injury was a street crossing in a populous city, a place where the injured party was not a trespasser, but had a perfect right to go, and where the company was required to anticipate his presence. The crossing was alleged to be 'extra dangerous by the track being hidden from view for some distance by intervening buildings.' It was there held that the facts were 'in no wise different from those involved in the ordinary case, where a locomotive is run over a highway at a high rate of speed without giving the statutory signals. These are merely acts of nonfeasance, not of aggressive wrong.'"

Before willfulness can be attributed to servants or employes in the operation of a train of cars, facts should be averred and shown that would charge them with knowledge, actual or imputed, of impending danger, before any duty of the company arises to require of it affirmative acts or effort to avoid resulting

injury. It is upon such knowledge that it is held to be the equivalent of willfulness: *Parker v. Pennsylvania Co.*, 134 Ind. 678, 34 N. E. 504.

In *Louisville etc. Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807, Mitchell, J., said: "Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury. Or it must ⁵⁰⁰ appear that the injurious act or omission was by design, and was such—considering time and place—as that its nature and probable consequence would be to produce serious hurt to some one. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal": *Louisville etc. Co. v. Murphy*, 9 Bush, 522; *Louisville etc. Ry. Co. v. Filbern*, 6 Bush, 574, 99 Am. Dec. 690; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 236, 71 Am. Dec. 263. The above language of Judge Mitchell is quoted with approval in *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504.

The rule is well settled that no purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness: See *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, and authorities there cited.

In the case we are here considering, the facts charged in the second paragraph of complaint show the grossest negligence, but the mere fact that such acts are characterized as "wanton" and "willful" do not make them such, when measured by the general facts alleged. While we are not considering the sufficiency of the complaint, we are considering the facts specially found, with the view of determining if they are sufficient to show willfulness on the part of the servants of appellee, upon which a judgment for the injury complained of can rest. We are unable to find a case holding that such facts constitute willfulness, and our attention has been called to none.

Judgment affirmed.

NEGLIGENCE.—TO CONSTITUTE WILLFUL injury there must be design, purpose, and intent to do wrong and inflict the injury; while to constitute wanton negligence, the party doing or failing to do the act must be conscious of his conduct, and though having no intent to injure, must be conscious from his knowledge of

surrounding circumstances and existing conditions that his conduct naturally or probably will result in injury: Louisville etc. R. R. Co. v. Anchors, 114 Ala. 492, 62 Am. St. Rep. 116, 22 South. 279.

RAILROADS—UNLAWFUL SPEED.—The violation of a municipal ordinance regulating the speed of railway trains is not such negligence per se as will afford a right of action: Reidel v. Philadelphia etc. R. R. Co., 87 Md. 153, 67 Am. St. Rep. 328, 39 Atl. 507.

McCULLOCH v. SMITH.

[24 Ind. App. 536, 57 N. E. 143.]

NEGOTIABLE INSTRUMENTS — MUTILATION—PLEADING.—In a statement of claim against the estate of a decedent or other pleading, based upon a note so mutilated and torn that the signature of the maker does not fully appear thereon, and alleging that the torn portion is lost, it must also be alleged that such mutilation was innocently done, and was the result of accident or mistake, to entitle the instrument to be admitted in evidence.

C. L. Jewett and H. E. Jewett, for the appellant.

G. H. Hester, E. G. Henry, and E. B. Stotsenburg, for the appellee.

⁵³⁶ BLACK, J. The appellee's statement of claim against the appellant, administrator de bonis non of the estate of James M. Hains, deceased, was based upon a non-negotiable promissory note of the decedent. While the copy of the note filed with the statement showed the signature of the maker thus: "J. M. Hains," it was alleged in the statement of ⁵³⁷ claim that the "note was originally executed by said decedent by signing his full name thereon, but that the same has been mutilated and torn, so that the signature of said decedent does not now fully appear thereon, and that said torn portion is lost, and cannot be found."

In discussing the action of the court in overruling a demurrer to the complaint, it is said by counsel for the appellant that, in order to make a good complaint upon a mutilated instrument and entitle it to be received in evidence, it must appear that the mutilation was innocently done, and was the result of either accident or mistake.

Our statute relating to the settlement of the estates of decedents provides that no action shall be brought by complaint and summons against the executor or administrator of an estate for the recovery of any claim against the decedent, but

the holder thereof, whether such claim be due or not, shall file "a succinct and definite statement thereof" in the office of the clerk of the court in which the estate is pending; and, if any claim against the decedent be founded upon any written instrument alleged to have been executed by him, the original, or a complete copy thereof, shall be filed with the statement: Burns' Rev. Stats. 1894, sec. 2465; Horner's Rev. Stats. 1897, sec. 2310. The sufficiency of the statement of claim may be tested by demurrer: Burns' Rev. Stats. 1894, sec. 2479; Horner's Rev. Stats. 1897, sec. 2324.

It has been held often that the statement or complaint is sufficient if it apprise the defendant of the nature of the claim and the amount demanded, and show facts sufficient to bar another action for the same demand: Taggart v. Tevanny, 1 Ind. App. 339, 27 N. E. 511, and cases cited.

The statute does not require the claimant to set forth his claim by a regular complaint constructed in accordance with the ordinary rules of pleading, but the "succinct and definite statement" of his claim must contain all such facts as are necessary to show prima facie that the decedent's estate is lawfully indebted to the claimant, or it will be ⁵³⁸ held bad on demurrer for want of sufficient facts: Windell v. Hudson, 102 Ind. 521, 2 N. E. 303; Walker v. Heller, 104 Ind. 327, 3 N. E. 114; Thomas v. Merry, 113 Ind. 83, 15 N. E. 244. The statute requires such a statement of facts as will show a legal liability on the part of the estate, and as will, with reasonable certainty, indicate to the representative of the estate what he is called upon to meet: Culver v. Yundt, 112 Ind. 401, 14 N. E. 91. The requirement above noticed relating to the filing of the instrument executed by the decedent on which the claim is founded, or a complete copy thereof, with the statement of claim, is not less strict than the provision of the Civil Code that, when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading: Burns' Rev. Stats. 1894, sec. 365; Horner's Rev. Stats. 1897, sec. 362.

In Blasingame v. Blasingame, 24 Ind. 86, it was said that the statute requiring a copy of the instrument as a part of the complaint was intended, by a direct method, in all cases, to attain the end which, in suits at law upon sealed instruments, was formerly reached by profert and oyer, and to require an actual showing by the copy in court, instead of that nominal production of it which profert was said to accomplish; that in such

suits it was not needed that profert be made when the instrument was lost; but the facts to excuse the profert must have been averred, and were traversable, and, if not proved, the suit failed.

In 1 Chitty on Pleading, 365, it is said: "The excuse for the omission of a profert, being traversable, must be stated according to the fact, as, either that 'the deed has been lost,' or 'destroyed,' 'by accident,' or 'that it is in the possession of the defendant,' and that 'therefore the plaintiff cannot produce the same to the court.' But in declaring upon a bill of exchange or other simple contract, no profert is to be made." And on page 366 it is said that, where a profert or an excuse for it is necessary, "if the plaintiff make profert of and thereby profess to produce the deed, when he is not prepared to do so, and the defendant plead non est ⁵³⁹ factum, the plaintiff will be nonsuited on the trial as it will not be sufficient in such case to prove that the deed was lost or destroyed, or in the defendant's possession."

In 2 Chitty on Pleading, 439, the forms of excuses of the profert are set forth as follows: "If the bond be lost—'and which said writing obligatory having been lost' or, 'and which said writing obligatory having been destroyed by accident' or, 'by the said defendant,' the said plaintiff cannot produce the same to the said court here," etc.

In 1 Greenleaf on Evidence, section 566, it is said: "If, by the unlawful act of a stranger, the instrument is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as an accidental destruction of primary evidence, compelling a resort to that which is secondary; and, in such case, the mutilated portion may be admitted as secondary evidence of so much of the original instrument. Thus, if it be a deed, and the party would plead it, it cannot be pleaded with a profert, but the want of profert must be excused by an allegation that the deed, meaning its legal identity as a deed, has been accidentally, and without fault of the party, destroyed."

In *Lee v. Alexander*, 9 B. Mon. 25, 48 Am. Dec. 412, there was in the complaint an averment that the date of the note sued on had been destroyed and mutilated without the knowledge, privity, or consent of the plaintiff. It was said by the court: "If the mutilation or alteration is of such a character as to destroy its identity, so that the party cannot plead it with a profert, the want of such profert may be excused by an allega-

tion that its legal identity had been accidentally destroyed, without the fault of the party, and in such case secondary evidence may be introduced for the purpose of establishing the original tenor of the instrument, and to account for its alteration or mutilation." It was also said: "Although the allegations in regard to the mutilation or alteration of the covenant are deemed substantially sufficient, yet they should properly have been made more specific."

⁵⁴⁰ In *Piercy v. Piercy*, 5 W. Va. 199, a bond was exhibited with a bill in equity, the bond being in a mutilated form, and no explanation being given as to how it became mutilated. The signature and seal had been torn off, and the name had been reinstated or pasted on near the middle of the paper at the bottom thereof. It was said by the court: "It lies upon the party seeking to enforce a bill or note to account for any alteration that appears on the face of the instrument. . . . The authorities are numerous that, if the bond is altered by the obligee in a material point, it thereby becomes void."

At common law, a note partly destroyed might be declared on as entire, and proof might be received of the destroyed part: *Duckwall v. Weaver*, 2 Ohio, 13. In that case, the declaration did not describe the note as mutilated and partly lost. An objection upon this ground was said by the court to have reference to the rule for declaring on deeds, "of which the defendant has a right to oyer, and of which the plaintiff is therefore required to make profert. In those cases, when the deed cannot be produced, the plaintiff may excuse himself from making a profert, by averring that the deed has been lost, by time and accident. In the case before us, it appears that a part of the note had been destroyed, and the objection was, that that fact had not been set out in the declaration. There is no analogy between this case and those in which that averment is required. In an action on a promissory note, the defendant not being entitled to oyer, a profert is not necessary, nor is it necessary to set out the note in the declaration—it may be given in evidence on the general counts—its mutilated state, therefore, need not be described in the pleadings. It is time enough to disclose that fact, and to account for it, when the paper is offered in evidence."

In *Master v. Miller*, 4 Term Rep. 320, cited in *Rees v. Overbaugh*, 6 Cow. 746, it was said that, even if the seal were torn off before the action brought, there would be no difficulty ⁵⁴¹ in framing a declaration which would obviate every doubt on that point by stating the truth of the case.

In *Stoner v. Ellis*, 6 Ind. 152, 160, it was said: "We are of the opinion that where the alteration is of such a character as to defeat entirely the operation of the instrument, for any purpose, as in the case of the erasure of the signature and seal to a deed, or other instrument, so that, admitting all to be true that appears upon the instrument, when produced, it would be void in law, it should be explained in the first instance, before it should be permitted to go to the jury."

Dean v. Speakman, 7 Blackf. 317, was an action on a promissory note brought by the payee against the makers. On the trial the plaintiff offered in evidence a paper bearing the signature of the defendant, which appeared to be a considerable fragment of a promissory note, and offered to prove by his attorney that the paper was part of a promissory note which had been placed entire in his hands by the plaintiff, but which had been mutilated by having a small piece torn off one end. The witness supposed this had been occasioned by frequent withdrawal and replacement of the note among the files where it was usually kept. The witness produced and swore to a copy of the entire note, made before it was torn, which corresponded with the note described in the declaration, and the witness stated that he had made diligent search for the missing piece, but could not find it. It was held that the admission of this testimony to establish the note was right, that the absence of the torn off part was sufficiently accounted for to let in secondary evidence of its contents, and the sworn copy was legal evidence for that purpose. It was said that the case bore a stronger analogy to that of a destroyed note than to a lost one, and that an action would lie on a destroyed note.

The signature of the maker is essential to the completeness and efficacy of a promissory note. It is so contemplated by the statute: Burns' Rev. Stats. 1894, sec. 7515; Horner's Rev. Stats. 1897, sec. 5501.

⁵⁴² There is as much need of pleading an excuse for failure to exhibit a promissory note on which a complaint or the statement of a claim against a decedent's estate is founded as there was at common law in an action on a sealed instrument for showing in the complaint an excuse for failure to make profert. Whatever excuse be made in the complaint or statement of claim, it is traversable, and therefore is material. When, in making the excuse for failure to exhibit the instrument with the complaint, it is made to appear that the note, since its execution, has been materially altered, it is also material to explain

the alteration. In the case before us it affirmatively appears that, after the execution of the note by the decedent, it was mutilated and torn, so that the signature of the maker does not fully appear thereon, and that the torn portion is lost, and cannot be found. On demurrer the pleading must be construed most strongly against the pleader. It must be considered that the note, in its present condition, does not show the name of a maker. The mutilation being expressly averred to have occurred after the execution of the instrument—that is, after it had been signed and delivered to the claimant—it devolved upon him to account for the mutilation in such manner as to show that the instrument is a subsisting promissory note on which the estate is still indebted to him. The note was so far destroyed that it could not constitute an exhibit to a complaint upon it, yet with sufficient excuse for its condition there might be a recovery upon the note as originally executed. It was not good pleading to file an exhibit materially differing from the note which would be introduced in evidence. A proper exhibit controls as to the contents of the instrument sued on, and the proof must not materially contradict it. The instrument having been deprived of an essential part of a promissory note, and it not having been the purpose to base the action upon the instrument in its present form, no exhibit should have been filed, but the complaint or statement should have proceeded ⁵⁴³ upon the theory that the action was one upon a note destroyed as such by mutilation. The mutilated note, in its present condition, would serve on the trial as partial proof in giving secondary evidence of the contents of the original instrument. As the instrument was not lost, or in the possession of the defendant, but was materially mutilated after execution, we think it was not sufficient for the holder merely to state the mutilation, which deprived it of its character as a promise of the decedent, without also showing what he would have to prove as a material part of his case, without which he could not recover; that is, that he was innocent of the mutilation. It was incumbent on him not merely to show why he could not file a copy of the note sued on, but also to account for its mutilation, thus necessarily disclosed in pleading.

If this would be necessary in suing the living maker of a promissory note—and we think it ought to be so considered—we can see no good reason for less comprehensiveness in the succinct and definite statement of a claim against the estate of a deceased maker. The judgment is reversed, and the cause

is remanded with instruction to sustain the demurrer to the statement of claim.

PROMISSORY NOTES.—ACTIONS ON DIVIDED, destroyed, and lost promissory notes are discussed in the notes to *Bank v. Sill*, 13 Am. Dec. 47; *Edwards v. McKee*, 13 Am. Dec. 480-483. When the identity of an instrument is destroyed by mutilation or alteration, want of proof thereof may be excused by an allegation that its legal identity was destroyed accidentally without fault of the party, and secondary evidence may be given to show its original tenor and to account for its alteration or mutilation: *Lee v. Alexander*, 9 B. Mon. 25, 48 Am. Dec. 412.

KING v. KING.

[24 Ind. App. 598, 57 N. E. 275.]

HUSBAND AND WIFE—GIFTS—SEPARATE PROPERTY OF WIFE.—If the property of a wife passes into the possession and control of her husband with her consent, it must be presumed that it is not a gift, but that he takes the property as trustee, for her, although there is no express promise to repay.

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—HUSBAND AS TRUSTEE.—If the separate property of a wife passes into the possession and control of her husband, with her consent, she is entitled to recover against his estate only the amount of the principal without interest, in the absence of an agreement to repay or to pay interest, or a demand for repayment.

E. S. Davis and W. Hickam, for the appellant.

J. E. Henley, J. B. Wilson, and O. Matthews, for the appellee.

598 HENLEY, J. Appellee filed her claim against the estate of John R. King, her deceased husband. The cause was tried by the court. At the request of the appellant, the court found the facts specially, and stated its conclusions of law thereon. Because of the fact that the vital question in the cause arises upon the special findings and conclusions of law, we set it out in full, viz.: "1. The claimant, Elizabeth V. King, is the surviving second wife of the decedent, John R. King. They were married in November, 1873. She had been previously married to one Presley Buckner, and had by him three children, James M. Buckner, Thomas Buckner, and Nancy M. Buckner, who subsequently intermarried with William H. Hancock. At the time of the marriage the ages of the children ranged from thirteen to twenty-one years; the oldest son then

residing in Missouri, and the others in the family with the claimant and Mr. King, ⁵⁹⁹ where they remained some three or four years. Thereafter these children lived at various times in the states of Missouri, Kansas, Illinois, Tennessee, and in Monroe county, Indiana. The decedent also had five children by a former marriage, four of whom lived in the family of decedent and claimant for an uncertain period after their marriage; their ages ranging from seven to twenty years. 2. In January, 1874, the father of claimant died. His estate was settled and distributed without administration. The claimant received as her interest in said estate in February, 1874, the sum of \$2,196, in the following items, to wit: Note of James Buskirk (brother of claimant), \$1,846; note to Marion Carroll, \$250; note of Fred K. Goss, \$100. The settlement of claimant's interest in her father's estate was made with the decedent, John R. King, and all the above notes went into his hands. The Buskirk note, of \$1,846, was given in lieu of land, and was made payable to John R. King. He afterward took two notes of Joseph Hodge, of \$500 each, in part payment of the Buskirk note, and received the residue, about \$800, in a land trade with Buskirk. He collected the other notes, used the money in his business, loaned some of it out in his own name, and some \$800 of it going into land of which he died seised. At various times during the marriage, upon the order and direction of his wife, the claimant, he paid out portions of said money to the children of claimant, and gave them certain property, which was to be credited upon the indebtedness to his wife. There was no accounting between them during his lifetime. During the marriage, and prior to his death, the decedent, John R. King, at the request and by the direction of the claimant, sent by draft, money order, or otherwise, and paid to the children of claimant, money, and delivered to them property, in the amount and to the value following, which said several sums are entitled to be credited and taken in part payment of the ⁶⁰⁰ \$2,196 received by the decedent, belonging to the claimant; that is to say:

Amounts paid to and received by William H. Hancock:

1875. Bay mare delivered to him.....	\$ 65
1877. September, Money sent to Illinois.....	250
1880. September, Money sent to Illinois.. ..	200
October 12, 1882. By draft, Ex. G.....	200
February 2, 1881. Money order.. ..	25

Total..... .. \$740

Amount paid James M. Buckner:

1876.	Amount paid Dr. Eastman	\$100
1876.	Amount paid Dr. Osgood.. . . .	50
1877.	Horse and buggy received.. . . .	150
1879.	Amount paid at home.....	50
1881.	March 5, By draft, St. Joe, Mo....	200
1896.	March 7, Money order....	25
1896.	December 26, Money order.. . . .	10

Total..... \$585

Amount paid Thomas J. Buckner:

1877.	Paid while at school at Bloomington...	\$ 45
1878.	Horse furnished.....	85
1879.	Draft to Mo....	200
1881.	February 2, Money order.. . . .	25

Total.. . . . \$355

Amount paid W. H. Hancock.. . . . \$740

Amount paid Jas. M. Buckner.... 585

Amount paid Thomas J. Buckner.... 355

Total.. . . . \$1,680

Amount received..... \$2,196

Amount paid.. . . . 1,680

Bal. principal unpaid.. . . . \$516

601 4. As to interest: Decedent is entitled to be charged with interest on the amount in his hands belonging to claimant at the rate of six per cent, to be calculated as upon a promissory note where partial payments had been made, except that from and after December 13, 1878, the date when decedent traded lands with James Buskirk in order that he might save the debt, and took \$800 in land, interest should be counted only upon what remained then due and unpaid after deducting therefrom \$800; the finding being that, upon this portion of the principal so invested in the land, interest should not, in equity, be calculated from and after December 13, 1878.

“Upon the foregoing special finding of facts, the court states, as conclusions of law, that claimant is entitled to recover upon her claim herein; that there remains due and unpaid of principal and interest the sum of \$1,875.80, which should be allowed

as a claim against said estate of the seventh class, and which should be paid by the administrator out of any moneys or assets of said estate in his hands as other such claims are paid."

The facts found present a case where the property of the wife, the principal of the fund, passed into the hands of her husband with her consent, with no finding as to whether a gift was intended, or whether the husband received the money as her agent or trustee. The presumption is that it was not a gift: 2 Lewin on Trusts, 778; Crawley's Law of Husband and Wife, 268; Eversley on Domestic Relations, 409; Wales v. Newbould, 9 Mich. 45; Jones v. Davenport, 44 N. J. Eq. 33, 13 Atl. 652; Hileman v. Hileman, 85 Ind. 1; Armacost v. Lindley, 116 Ind. 295, 19 N. E. 138; Denny v. Denny, 123 Ind. 240, 23 N. E. 519. Under the facts, the court was warranted in holding that the husband took the property as trustee for his wife, although there was no express promise to repay: Parrett v. Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713; Garner v. Graves, 54 Ind. 188.

It is insisted that the court erred in rendering judgment in appellee's favor for a greater amount than the amount ⁶⁰² of the principal found due her. The amount of unpaid principal, according to the finding of the court, was \$516. The difference between that amount and \$1,875.80, the judgment rendered in appellee's favor, is made up by the accumulation of interest at six per centum for a long period of time. The question then is, Was appellee entitled to interest upon the fund in her husband's hands, under the facts found by the court? This was not a loan of money from the wife to the husband. There was no agreement to repay the principal, or to pay interest thereon. There was no demand made for the repayment of the money, and consequently no refusal. It is not a case of "money due on any instrument in writing, on an account stated from the day of settlement, or an account closed upon the day an itemized bill shall have been rendered and payment demanded, or on money had and received for the use of another, and retained without his consent": See Horner's Rev. Stats. 1897, sec. 5200. It is true that the court has found that the decedent should be charged with interest on the amount in his hands belonging to claimant at the rate of six per centum per annum, to be calculated as upon a promissory note where partial payments had been made. But this is a mere conclusion, not based upon any facts found which justify it. If by the finding it appeared that there was an agreement to repay the money, with interest, or

that appellee had demanded the return of the money, and decedent had refused to repay it, or that the money was taken into decedent's possession without appellee's consent, and retained against her wishes, the interest charge might be sustained. If the court was to establish a rule permitting interest to be charged in cases presenting such facts as are presented by this case, a small amount of principal placed in the hands of the husband by the wife, without any intention upon her part at the time of ever demanding repayment or of treating the transaction as a debt, could, in the course of a long period of years, by the accumulations of interest, be ⁶⁰³ used by the wife as a means of wiping out an estate to the disadvantage of creditors and heirs. The special finding is silent as to any fact necessary to uphold a charge of interest. The facts found would entitle appellee to judgment for the amount found to be due her, after deducting the various sums which the finding shows the estate of decedent should have credit for. The judgment is reversed, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellee for \$516.

Robinson, J., dissents.

IF A HUSBAND USES THE SEPARATE PROPERTY OF HIS WIFE in his business and for the support of the family, he or his estate is liable presumptively to her therefor as her trustee: *Haymond v. Bledsoe*, 11 Ind. App. 202, 54 Am. St. Rep. 502, 38 N. E. 530; and if she delivers her money to him, the law presumes that he takes it as a trustee for her and not as a gift: *Parrett v. Palmer*, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713. But see the monographic note to *Morris v. Fletcher*, 77 Am. St. Rep. 108; *Clark v. Patterson*, 158 Mass. 388, 35 Am. St. Rep. 498, 33 N. E. 589.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

ROTCH v. FRENCH.

[176 Mass. 1, 56 N. E. 893.]

GUARANTY—DURATION OF—WHEN RESTRICTED TO THE LIFE OF THE BENEFICIARY.—A guaranty in the name of W. J. R. of a dividend of six per cent per annum on stock subscribed for by him in a specified corporation does not extend beyond his life, where a reasonable time has elapsed subsequently and before his death.

Two actions upon guaranties, one to William J. Rotch and the other to A. H. Seabury. At the trial the defendant requested the court to direct a verdict for him in each case, on the ground that there was no evidence that the guaranties were for the consideration claimed by the plaintiffs, and that neither covered more than one dividend, and that they did not run in favor of the executors of Rotch or Seabury, the latter of whom died in 1887 and the former in 1883. The request was refused, and the court submitted to the jury the question, "Was the consideration, if any, of the guaranty, an agreement on the part of the plaintiffs' testator to take and pay for one hundred shares in the capital stock of the French, Potter & Wilson corporation?" To this question the jury answered in the affirmative, and were then directed to return verdicts for the plaintiffs for the amounts due on their respective guaranties. The cases were, at the request of the parties, reported to this court for its determination.

R. M. Morse and L. Bass, Jr., for the defendant.

H. M. Knowlton and F. H. Nash, for the plaintiffs.

² HOLMES, C. J. These are actions upon guaranties signed by the defendant and others in similar form as follows: "Chicago, Jan. 1, 1886. We hereby guarantee the payment to Mr. William J. Rotch of a dividend of 6 per cent per annum on stock subscribed to this day in the corporation of French, Potter & Wilson." It appeared that Rotch and Seabury, the other person receiving a guaranty, respectively subscribed for one hundred shares in the corporation. The plaintiffs contended and the jury found that the agreements to take these shares were the considerations for the guaranties. The first question raised by the exceptions is whether there was any evidence to support these findings. We shall assume for the purposes of decision that the evidence was sufficient. The agreements suggest the consideration upon their face. The defendant testified to an interview on December 28, 1885, in which Rotch and Seabury and another in the morning said that they would each take ten thousand dollars, and in the afternoon asked for a guaranty, to which the defendant replied that he and his associates would give it if the subscribers would give them all the money they wanted to make the business a success. This, it appears from other conversation, meant, if they would take fifty thousand dollars instead of thirty thousand dollars. ³ The answer, according to the defendant, was, "We will give you more money later." On January 10, 1886, the defendant met Rotch and the other subscribers, and gave them the certificates, receiving checks or notes in payment. At the same time they asked to have a guaranty sent them, and these guaranties were sent. On this evidence we assume that the jury were warranted in finding that, even if Rotch and Seabury at first promised unconditionally to take the stock before the bargain was closed or any binding contract made they insisted upon having a guaranty, and that they accepted and paid for their certificates on the express stipulation that they should receive the guaranty which they did receive, and which of course was not a gift. It is true that the defendant and another testified that the real consideration was that Rotch and his fellow subscribers should give more money as it was needed, but that testimony was controverted and the jury had a right to reject it. The dividends were paid under the contract during the lives of Rotch and Seabury, although they made no further subscription or advance. It is not material whether the consideration was in strictness an agreement to subscribe or the subscription itself.

But the defendant contended and asked a ruling to the effect that the guaranties had run out, and upon this ground, in the opinion of a majority of the court, he must prevail. We assume without deciding that more than one dividend was guaranteed, but we are of opinion that the agreement does not purport to be a contract enduring as long as the shares represented by Rotch's and Seabury's certificates shall be in existence, or, in other words, during the whole life of the corporation.

The meaning of the words might vary according to circumstances, and the interpretation of them is a question for the instructed imagination, taking the facts just as they are. When a guaranty is asked for and given in the way in which this was, what is it reasonable to suppose that a normal business man means? No doubt if we consider mainly the object which Rotch and Seabury had in exacting the guaranty (*Drummond v. Crane*, 159 Mass. 577, 579, 38 Am. St. Rep. 460, 35 N. E. 90), the same considerations which led them to want one logically would lead them to want one which should go to the character and value of the stock, one which should be of a duration equal to that of the stock, and which would be as useful ⁴ if they saw fit to sell as if they preferred to keep it. On the other hand, it is not likely that any of the parties looked forward to the defendant's establishing, or binding his estate to establish, an annuity or guaranty fund, to continue as long as the corporation lasted, and to await distribution until the corporation should be dissolved. Probably neither party thought the transaction out to its logical end, or put to himself definitely the question how long the guaranty was to last. Probably whatever result we come to would have raised some demur on the one side or the other if it had been stated at the time. We must decide, therefore, by drawing the line as we think most in accordance with the exact words used, and with what the parties would have been likely to agree upon if they had thought and talked about the matter.

This was not a guaranty offered to the public in the market, as an inducement to subscribe. It was not a guaranty indorsed upon a bond or certificate of stock, as in *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 397. Rotch and Seabury had had previous dealings with the defendant and the other guarantors while the latter were doing business as partners and were selling agents for a corporation in which Rotch and Seabury were interested. Rotch and Seabury wanted the guarantors to form the corporation in which they afterward took stock, and simply

got this separate parol agreement thrown in, although not gratuitously, at the last minute, after they already had become desirous to see the enterprise started.

Under such circumstances it does not seem to us clear that the parties meant to bind themselves for more than a reasonable time, while the conditions remained substantially unchanged, if indeed they went further in their minds than their respective personal relations: See *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161. The promise guarantees a payment "to Mr. William J. Rotch" personally, without mention of executors, administrators, or assigns. It guarantees no more in terms. A promise to pay a like sum annually to Rotch or Seabury would be limited to payments during their lives. However we might deal with similar words in a different case, we are of opinion that in the present one, after a reasonable time had elapsed, they had no further operation when Rotch and Seabury ceased to be stockholders by death.

⁵ We do not pretend to think that our conclusion is the only one possible. If it would be going too far in one direction to hold the guaranty absolute, or in the other to confine it to one year's dividends, either of which questions is debatable, there is still the doubt whether Rotch's and Seabury's executors, who represent the persons of their respective testators, are not entitled even now to stand in their testator's shoes. But we think that a line must be drawn somewhere, and that it falls most naturally where we have drawn it. It hardly needs to be added that the question of the scope of the promise is a question of construction not affected by the state of the law as to the right to assign the contract or to sue upon it when assigned in the assignee's own name.

Verdicts set aside.

A CONTRACT OF GUARANTY DOES NOT TERMINATE with the life of the guarantor unless such an intention is expressed plainly in the guaranty itself: *Kernochan v. Murray*, 111 N. Y. 306, 7 Am. St. Rep. 744, 18 N. E. 868. See, too, the monographic note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 814.

COMMONWEALTH v. BARROWS.

[176 Mass. 17, 56 N. E. 830.]

EVIDENCE—CARDS AND CIRCULARS OF THE ACCUSED.—On the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman and thereby causing her death, cards of the defendant found in his trunk, reading after his name, "Magnetic treatment, female irregularities a specialty. Appointments by mail," and giving his business address, are admissible in evidence as tending to show that he held himself out as a person whose business it was to procure abortions. The prosecuting attorney may properly argue to the jury that such is the meaning of the cards.

Indictment for unlawful attempt to procure the miscarriage of a woman, and thereby causing her death. At the trial certain cards found in the defendant's trunk, or his room, were offered in evidence. These cards read as follows: "3 to 5 P. M., 7 to 9 P. M. F. H. Barrows, magnetic treatment, female irregularities a specialty. 925 Washington St., appointments by mail. Boston." "F. H. Barrows, magnetic and electric treatments, for all female weaknesses, leucorrhoea, suppressions, cancer, tumor, etc., 972 Washington St., Boston." Both cards were admitted in evidence against the defendant's objection, and he reserved exceptions, and the district attorney argued to the jury that these cards advertised the business of the defendant as that of an abortionist. Verdict of guilty. The defendant alleged exceptions.

H. P. Harrisman, for the defendant.

M. J. Sughrue, first assistant district attorney, for the commonwealth.

18 LATHROP, J. Two questions only are raised by the bill of exceptions. The first is as to the admission in evidence of certain cards found in the defendant's trunk in the room occupied by him, and the second is allowing the district attorney to argue to the jury that the defendant, by the cards, advertised his business as that of an abortionist.

The defendant was indicted under the Public Statutes, chapter 207, section 9, for thrusting a certain instrument into the body and womb of one Frances Adams, with intent to cause and procure the miscarriage of said Adams, and for causing her death thereby. In such cases cards and circulars of a defendant have been held to be admissible in evidence, if they tend to show

that the defendant holds himself out as a person whose business it is to procure abortions. It is not to be expected that cards and circulars of this kind will state the fact in precise terms, or that their meaning will not be more or less disguised.

The advertisements of the defendant in *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560, are not stated in the report of the case, but they appear in the bill of exceptions, and are as follows: "Dr. Bailey, 48 Howard street, may be consulted from nine to nine. No other physician in the city has the same facilities for successful treatment of all female troubles. His method is the only safe, the only sure and harmless one. Board and nurse when necessary." "Dr. Herman, 7 Tremont Row, may be consulted from nine to nine; excels all others in quick and thorough cures of female troubles. Only one visit necessary. Has a ¹⁹ remedy; will establish periods in two or three days. Useful information to ladies and gentlemen." It appeared that the defendant did business under the name of Dr. Bailey and also under the name of Dr. Herman.

The indictment in *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560, was similar to the one in the case at bar, and it was said by the court that these advertisements, "to say the least, might be understood to hold out that he [the defendant] was ready to do acts of the kind charged." There is no substantial difference between the advertisements in *Commonwealth v. Bishop*, 165 Mass. 148, 42 N. E. 560, and the cards in the case at bar: See, also, *Weed v. People*, 3 Thomp. & C. 50; affirmed, 56 N. Y. 628.

We have no doubt that the cards were admissible in evidence; and that the district attorney was properly allowed to argue to the jury what their meaning was.

Exceptions overruled.

ABORTION.—ON EVIDENCE in prosecutions for causing abortion, see *Jones v. State*, 70 Md. 326, 14 Am. St. Rep. 362, 17 Atl. 89; *Rhodes v. State*, 128 Ind. 129, 25 Am. St. Rep. 429, 27 N. E. 345; monographic notes to *Abrams v. Foshee*, 66 Am. Dec. 89-91; *State v. Moore*, 95 Am. Dec. 786-788.

GARGAN v. WEST END STREET RAILWAY COMPANY.

[176 Mass. 106, 57 N. E. 217.]

STREET RAILWAYS — PASSENGER, WHEN ONE CEASES TO BE.—One who has left a street-car for the purpose of entering her dwelling-house on the opposite side of the street is no longer a passenger.

STREET RAILWAYS—OBSTRUCTION OF HIGHWAYS.—A fender projecting from the rear of a street-car is not an obstruction to the highway, nor is its presence such a negligent occupation of the highway as to make the corporation liable for injuries received by one who, while it is quite dark, goes so near the end of the car that he strikes it and falls, and thereby suffers injury.

Tort for personal injuries claimed to have been received by the plaintiff from falling over a fender projecting from the rear of a street-car from which she had alighted. Verdict for the plaintiff; the defendant alleged exceptions.

M. F. Dickinson, Jr., and W. B. Farr, for the defendant.

P. M. Keating, for the plaintiff.

106 BARKER, J. The car upon which the plaintiff rode from Boston stopped about opposite her dwelling to allow passengers to leave. She left by the rear door. Her house was upon the right as she passed from the door. The gate upon that side was up, and she descended from the platform by the steps leading to the left, so that when she reached the street her back was toward her house. There was a cross-walk, about seven feet wide, partly occupied by the rear end of the car, from which at the time a fender projected about two feet. Enough of the cross-walk was left unoccupied for her passage to the sidewalk of the side of the street where her house was. The hour was about 6 o'clock of an evening in the middle of December. There were street lights, not very near, and the locality was quite dark, although several witnesses testified that the fender was visible to them.

Upon reaching the ground, the plaintiff at once turned, and began to walk toward the other side of the street upon the cross-walk. In so doing she went so near the end of the car that she struck against the projecting fender, and fell. She **107** did not see the fender, and did not know that it projected beyond the end of the car. Both ends of street-cars have fenders, but usually they are so adjusted that they project only

from the front end. This fender had in some way become so disarranged that it projected from the rear end of the car without the knowledge of the defendant's servants who were in control of the car, and contrary to the intention of the defendant. It is admitted that when the plaintiff left the car she ceased to be a passenger of the defendant: See *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391; *Bigelow v. West End Street Ry. Co.*, 161 Mass. 393, 395, 37 N. E. 367. When she began to walk toward her house she was merely a traveler upon the highway. The respective rights and duties of the plaintiff and the defendant were not those of a passenger and a common carrier, but those of a pedestrian crossing a public street in which was a street railway track then occupied by a street-car, and of a street railway corporation lawfully using the same street in its traffic. From the time when she left the car until she was hurt the car remained stationary. The condition of things which existed at the time when she reached the street and turned to walk home was in no way changed by the defendant, nor were her actions in the least controlled or influenced by it. It cannot be contended that the presence of the car in the street, or its stoppage to allow passengers to leave, was unlawful; nor is it claimed that the stoppage was too long, or that the plaintiff expected that the car would move on to allow her to cross the street. The only cause of the accident was the plaintiff's own act in walking against the fender, and the contention is that the presence of the fender projecting from the rear end of the car was such a negligent occupation of the highway by the defendant as to make it liable for the plaintiff's injury. That the collision was the plaintiff's own act distinguishes the case from the common one in which two bodies, each lawfully present in a highway, and each in motion, come into collision. Instances in which a traveler collides with or is injured by a stationary vehicle or other object lawfully placed in a highway by some other person or traveler are not very rare. One of our earlier cases declared the right of the owner of lands abutting on a highway to erect buildings and fences on the street line, and to place in¹⁰⁸ them doors and gates which would swing over the street when opened, to place temporarily building materials and earth from cellar excavations within the street, and to allow horses and carriages to stand occasionally in the street against or near a house: *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261. In *Judd v. Fargo*, 107 Mass. 264, a sled with sap tubs upon

it, left standing within the limits of the way, and outside of the traveled path, caused the plaintiff's injury by the frightening of his horse. It was held that the defendant had a right to have the sled and tubs remain in the highway for a reasonable time for the purpose of transferring them to his own premises, and that all that the law requires in such a case is that the obstruction shall not be continued for an unreasonable length of time. That the probability or improbability of the presence of such an obstruction was considered to be immaterial to the defendant's right so to leave his sled and tubs is to be inferred from the fact that in the same case the defendant was not allowed to show that other persons were accustomed to do the like; in other words, it seems that the test applied to decide the question of the defendant's liability was not whether the sled and tubs as left by him were likely to produce the accident, but whether he had the right to leave them as he did. Any vehicle stationary upon a highway over which travelers are passing and repassing may be an occasion of injury to them if they are brought into contact with it by their own motions. In such cases the test of the liability of the owner of the stationary vehicle to the traveler who walks against it is not the probability that the traveler will be hurt if he walks against the vehicle, but is whether its owner was within his right in having such a vehicle stationary upon the street.

In the present case the car was properly upon the street, and its stoppage was merely temporary, and for a proper purpose. It is not contended that the car remained stationary longer than was necessary. The fenders at each end of the car were not like a cutting instrument, or an apparatus so dangerous that it ought not to be transported upon a public way without unusual care for the safety of travelers, but were appurtenances of the car, with which the law required it to be equipped: Stats. 1895, c. 378. It is not contended that they ¹⁰⁹ were unlawful, or that there was any statute or ordinance which prescribed whether the fenders should be in one position or another, or which forbade the defendant to propel in the street a car with a fender projecting beyond the end of the rear platform. That fenders do not usually so project bears upon the question of the plaintiff's care or negligence, but does not make it unlawful to propel in the street a car with a fender so projecting. Vehicles are frequently met with in the streets with appurtenances projecting as far from the rear end of the main portion of the vehicle as the fender projected in the pres-

ent instance. So loads of iron rods or pipes, lumber, beams, and other like articles often project to much greater distances behind the vehicles upon which they are. It is not unusual to see two or three wagons, one attached behind the other, drawn through the streets by one team. Yet a traveler who walked into such an obstacle to his passage, supposing that, if he avoided collision with the body of the vehicle to which the team was attached, the way would be clear, would collide with an obstacle which was rightfully in place, and could not recover for his injury. Nor would it be different if the traveler walked against such an obstruction in the night-time, not seeing the obstruction on account of the darkness, if the owner of the vehicle had complied with such requirements as to lights as were in force at the place where the collision occurred. The case does not show that there were any such requirements, or that, if there were, they were not complied with by the defendant. We know of no requirement anywhere that a street-car or other vehicle used at night upon a highway shall be so lighted that every part of it shall be plainly visible to those who come upon it in the rear as well as in front. We think, therefore, that, irrespective of the question whether the plaintiff could be found to have been in the exercise of due care in walking against the fender, a verdict should have been ordered for the defendant, because, upon the undisputed evidence, the obstacle against which the plaintiff walked was part of a vehicle lawfully using the street within the defendant's right.

Exceptions sustained.

PASSENGER, WHEN ONE CEASES TO BE.—The contract of carriage by a street railway company terminates when the passenger leaves the car: *Central Ry. Co. v. Peacock*, 69 Md. 257, 9 Am. St. Rep. 425, 14 Atl. 709. When he steps to the ground, his rights are those of a traveler upon a highway and not those of a passenger: *Creamer v. West End Street Ry. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456, 31 N. E. 391.

PEARL v. WEST END STREET RAILWAY COMPANY.

[176 Mass. 177, 57 N. E. 339.]

A PHYSICIAN IS AN INDEPENDENT CONTRACTOR when employed by a corporation to make a personal examination of the litigant. Hence, such corporation is not answerable for any suggestions given by such physician to such litigant.

A PHYSICIAN IS NOT THE AGENT OR SERVANT of the person employing him to make a physical examination of another where it does not appear, but that it was left wholly to the physician to determine what he should do and how he should do it.

Tort for personal injuries. The trial court directed the jury to return a verdict for the defendant, but, at the request of the plaintiff, reported the case for the determination of the supreme court.

C. Reno, for the plaintiff.

W. B. Farr and M. F. Dickinson, Jr., for the defendant.

178 HOLMES, C. J. This is an action seeking to charge the defendant with the alleged results of a doctor's examination of the plaintiff. The plaintiff had had an accident and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him. The plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg. The plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg. The examining doctor then told the plaintiff to "try standing on his left leg." The plaintiff tried it, fell, and attributes subsequent hysterical trouble to this cause. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

It would be a strong thing to say that the evidence warranted finding anyone responsible for the accident except the plaintiff himself. The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself into the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest and who had no authority of any kind. Furthermore, it recognized in its very words that perhaps the plaintiff was right in thinking that he could not stand in that way. It only called on him for an experiment in a region of admitted doubt. How far the experiment should go necessarily

was left to the plaintiff himself when he should make it. If he carried it too far the doctor was not to blame: See *Latter v. 179* Braddell, 50 L. J. Com. P. 166, a much stronger case than the present.

But, further, the doctor was not an agent or servant of the defendant in making his examination; he was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employé is more distinctly free from the control or direction of his employer: See *Linton v. Smith*, 8 Gray, 147; *Milligan v. Wedge*, 12 Ad. & E. 737, 741, 742. In this case the doctor was informing himself according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him: See *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 424, 34 Am. Rep. 675; *Secord v. St. Paul etc. Ry. Co.*, 18 Fed. 221, 225.

An argument is addressed to us drawn from the liability of a litigant for his attorney: *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39. But no argument can be trusted that relies on that analogy. Perhaps the liability for an attorney rests on the fact that the very essence of his employment was to represent the person of a party to a suit. *Attornatus fere in omnibus personam domini representat*: *Bracton de Legibus*, fol. 342a. It must be remembered that this right of representation in a law suit was conceived with difficulty and only gradually granted, and as first allowed seems to have been worked out through some sort of fictitious identification. Whether for that reason or another attorneys sometimes have been spoken of as servants (*Anonymous*, 1 Mod. 209, 210), and their acts within the scope of their employment always have been said to be the acts of their clients: *Parsons v. Loyd*, 3 Wils. 341, 345; *Barker v. Braham*, 2 W. Black. 866, 868, 869; 3 Wils. 368, 374; *Bates v. Pilling*, 6 Barn. & C. 38, 41; *Newberry v. Lee*, 3 Hill, 523; *McAvoy v. Wright*, 137 Mass. 207. In short, the liability of client for attorney is the result of a special series of events, and cannot be allowed to found a general rule.

We are of opinion that on one or the other of the foregoing grounds the direction was right.

In the view which we take, the exceptions to the exclusion of ¹⁸⁰ evidence become unimportant. The questions excluded went to the general skill of the doctor's examination. This was

immaterial, as the ground of the claim was a specific fact definitely stated.

Judgment on the verdict.

A PHYSICIAN WHO SENDS ANOTHER PHYSICIAN to attend a patient is not liable for his neglect or want of skill, for a party employing a person who follows an independent occupation of his own is not answerable for his negligent or improper acts: *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 33 Atl. 389.

PHYSICIANS.—IF A RAILROAD COMPANY, voluntarily assuming to employ medical aid for its injured employes, exercises reasonable care in selecting a competent physician, it is not liable for his malpractice committed in the treatment of the servant: *Pittsburgh etc. R. R. Co. v. Sullivan*, 141 Ind. 83, 50 Am. St. Rep. 313, 40 N. E. 138.

MUNROE v. DEWEY.

[176 Mass. 184, 57 N. E. 340.]

SPENDTHRIFT TRUSTS.—Where, under a trust, the income of property is given to a legatee for life with a direction that "no income or principal shall in any case be assignable or alienable by anticipation or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his actual receipt thereof," a trustee in bankruptcy of such beneficiary is not entitled to have any part of such income paid to him by the trustee.

Suit in equity to obtain a construction of the will of Eustace C. Fitz.

F. E. Fitz, pro se.

No counsel appeared for the plaintiffs.

¹⁸⁴ HOLMES, C. J. This is a bill brought by trustees under a will for instructions whether certain income shall be paid to the legatee or to his trustee in bankruptcy. The income was given to ¹⁸⁵ the legatee for life, and the will expressly directs that "no income or principal shall in any case be assignable or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his or her actual receipt thereof." Even if this clause attempts to go further than the law permits, its validity with regard to an equitable life estate is settled, as against both attaching creditors and assignees in insolvency: *Billings v. Marsh*, 153 Mass. 311, 25 Am. St. Rep. 635, 26 N. E. 1000. The trustee in bankruptcy very candidly admits that he does not think that he can distinguish the decisions or make good his claim. We see no

ground for a distinction in the words of the bankrupt act, section 70: U. S. Stats. of July 1, 1898, c. 541; 30 U. S. Stats. at Large, 544. Some matters discussed by the defendant Fitz in his unnecessarily elaborate brief are not open.

Decree accordingly.

ON SPENDTHRIFT TRUSTS, see the monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408; *Freeman on Executions*, 4th ed., secs. 116, 189a, 459.

MARSHALL v. MASON.

[176 Mass. 216, 57 N. E. 340.]

WILLS—EXECUTION—ATTESTATION OF.—If the witnesses sign in the presence of the testator, who signs immediately afterward in their presence, the whole transaction being as completely one as it can be in the order of events, the will is not properly executed, and cannot be admitted to probate.

Appeal from a decree refusing to admit to probate two wills executed in the manner stated in the opinion.

G. R. Pulsifer, for the appellant.

J. M. Marshall and H. W. Brown, for the appellee.

²¹⁶ **HOLMES, C. J.** The only question with which we need to deal upon this report is whether an instrument is duly executed ²¹⁷ as a will under our statutes if the witnesses sign first in the presence of the testator and the testator signs immediately afterward in their presence, the whole transaction being as completely one as it can be with that order of events. The question has been answered so fully by Mr. Justice Gray in delivering the judgment of this court in *Chase v. Kittredge*, 11 Allen, 49, 56, 63, 64, 87 Am. Dec. 687, that we think discussion unnecessary. "The manifest intention of the statute is that: 1. The will should be put in writing and signed by the testator; 2. His will so written be attested by the witnesses; and 3. The witnesses subscribe in his presence in evidence of their attestation to his written will." It is true that in that case the witness in question signed in the absence of the testator and some time before him. But the chief justice does not confine his reasoning to that case, and evidently meant, with the concurrence of his brethren, to establish a general rule in

the words which we have quoted. We regard that rule as founded on good sense and the plain meaning of the words of the statute. Many of the cases cited at the present argument are cited in the opinion. Others in accord with it are *Jackson v. Jackson*, 39 N. Y. 153, 162; *Sisters of Charity of St. Vincent de Paul v. Kelly*, 67 N. Y. 409, 413; *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712. See, also, *Mendell v. Dunbar*, 169 Mass. 74, 76, 61 Am. St. Rep. 277, 47 N. E. 402.

Decree of probate court affirmed.

ATTESTATION OF WILLS—ORDER OF SIGNING.—The decision in the principal case expresses the rule upon the subject maintained by the English courts. It is not universally applied in the United States. Some of our courts regard the order of signing by the witnesses and the testator as immaterial: *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; *Gibson v. Nelson*, 181 Ill. 122, 72 Am. St. Rep. 254, 54 N. E. 901.

DEXTER v. BOSTON.

[176 Mass 247, 57 N. E. 379.]

CONSTITUTIONAL LAW—STREET ASSESSMENTS PROPORTIONATE TO THE FRONTAGE.—A statute which requires all expenses incurred in the making of a sewer in a public highway to be assessed to each parcel in proportion to the number of lineal feet which each measures on such highway is unconstitutional, because under such assessment some of the parcels may be assessed for less and others for more than the benefits received.

CONSTITUTIONAL LAW.—THE ACTUAL EFFECT OF A STATUTE in cases wherein its constitutionality is assailed is not material. It is sufficient that the statute according to its terms will violate the provisions of the constitution in its application to cases which may be expected to arise.

UNCONSTITUTIONAL STATUTE—RECOVERY OF MONIES PAID UNDER.—If the payment of an assessment is induced by compulsory process and made under protest, it may be recovered back if the statute under which it was made is unconstitutional. The right of recovery is not impaired by the fact that the assessment was added to the general tax due from the plaintiff.

Action to recover the amount of an assessment paid by the plaintiff to the defendant city. Judgment for the defendant, and the plaintiff appealed.

J. Lowell and H. H. Darling, for the plaintiff.

S. M. Child, for the defendant.

²⁵⁰ KNOWLTON, J. In its essential features this case is like *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, in which it was held that the Statutes of 1892, ²⁵¹ chapter 402, is unconstitutional in its requirement that all expenses incurred in the making of a sewer in a highway or strip of land or other place in the city of Boston, to an amount not exceeding four dollars for each lineal foot of sewer, shall be repaid to the city as the assessable cost of the work, by the owners of the several parcels of land bordering on the highway or strip of land in which the sewer is made, and in its direction that this assessable cost shall be apportioned to each parcel in proportion to the number of lineal feet which it measures on said highway or strip of land.

It is now settled law in this court, as it is in the supreme court of the United States, and in many other courts, that after the construction of a public improvement a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits, and be proportional to the benefits. So far as there is anything in the early cases which seems at variance with this doctrine, it is controlled by the later decisions: *Boston v. Boston etc. R. R. Co.*, 170 Mass. 95, 49 N. E. 95; *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204; *Sears v. Boston*, 173 Mass. 71, 53 N. E. 138; *Sears v. Street Commrs.*, 173 Mass. 350, 53 N. E. 876; *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187. The principle involved has been so recently and so fully considered in the cases above cited that it is unnecessary to discuss it at length in this opinion. It was shown in *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, that as applied to the facts of that case, and of many supposable cases, the requirements of the statute might produce assessments upon some estates greatly in excess of the benefits received, and, as compared with other estates, greatly disproportionate to the benefits. For this reason the statute was declared unconstitutional. In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the constitution in its application to cases which may be expected to arise. The case then before the court furnished a demonstration of the injustice and deprivation of constitutional rights which might result from the enforcement of the statute. The present case illustrates in a similar way that the assessments on different lands made under this statute are not always proportional to the benefits. There

is a great difference in value on account of the difference in grade between lands at different ²⁵² points along the line of the sewer, and there is the same kind of question that was referred to in *Weed v. Boston*, 172 Mass. 28, 51 N. E. 204, in regard to an assessment upon land on the southerly side of Ashford street, so called, where there is intervening land in private ownership between the strip taken in the private way called Ashford street and the parcel on which the assessment was made. There is also an important fact which was wanting in the other case, namely, that the sewer turns at right angles where it enters Ashford street, and runs on two sides of the parcel at the corner. As the assessment was required to be made according to the lineal measurement of the land along the sewer, that parcel, which receives but slight additional benefit from the turn in the sewer, is doubly assessed.

That part of the statute which directs the making of assessments in this way is unconstitutional and void. The action of the superintendent of streets in making the assessment rests on this part of the statute, and it is impossible to find anything in it that stands upon a valid part of the statute which is separable from the part that is objectionable. The assessment was, therefore, void, and the payment by the plaintiff, having been induced by compulsory process and made under protest, may be recovered back in this action: *Sumner v. Dorchester*, 4 Pick. 361; *Lincoln v. Worcester*, 8 Cush. 55; *Wright v. Boston*, 9 Cush. 233, 241; *Goodrich v. Lunenberg*, 9 Gray, 38; *Gerry v. Stoneham*, 1 Allen, 319; *Day v. Lawrence*, 167 Mass. 371, 45 N. E. 751; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092.

This is not like a case where there is a mere irregularity in the proceedings, which must be taken advantage of by a writ of certiorari. Action under an unconstitutional statute is as if there were no statute: *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Connecticut River R. R. Co. v. County Commrs.*, 127 Mass. 50, 57, 34 Am. Rep. 338.

The fact that the collection was made under the Statutes of 1891, chapter 323, sections 16, 18, by adding part of the assessment to the general tax of the plaintiff, does not affect his right to recover it back in this proceeding. It did not become a part of his general tax, but was separable from it. When a general tax is excessive by reason of overvaluation, or error in including property that is not assessable, the party is left to his remedy by an application for an abatement, and he cannot re-

cover back the tax in an ²⁵³ action of this kind. But the provisions of law which prevent recovery in such cases are not applicable to this assessment. According to the terms of the report there must be judgment for the plaintiff.

STREET ASSESSMENT BY FRONTAGE.—A provision in a city charter authorizing the improvement of streets at the cost of abutting property, in proportion to the frontage without regard to special benefits, is unconstitutional: *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 51 S. W. 848.

TAXES—RECOVERING BACK.—If an illegal and void tax is paid, under protest, to prevent a seizure and sale of the taxpayer's property, it may be recovered back: See the monographic note to *Baltimore v. Lefferman*, 45 Am. Dec. 164. Compare *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512.

MULHALL v. FALLON.

[176 Mass. 266, 57 N. E. 386.]

DEATH—DEPENDENCE FOR SUPPORT WHICH WILL JUSTIFY RECOVERY FOR.—In an action by a mother to recover for the death of her adult son, she sufficiently shows that she was dependent on him for support if she produces testimony to the effect that she was very poor, that he sent moneys repeatedly with which she bought food, and that for two years past she had almost entirely depended on him. Partial dependence for the necessities of life is enough.

CONSTITUTIONAL LAW—RESTRICTION TO STATE BOUNDARIES.—While the legislative power is, for most purposes, territorial, there is no doubt that it may confer rights upon alien nonresidents.

DEATH OF RELATIVE—NONRESIDENT ALIEN'S RIGHT TO RECOVER FOR.—A mother who has never been in this state, and who is a citizen and resident of Ireland, is entitled to recover in the courts here for the death of her son without conscious suffering due to the wrongful act of another.

Tort by the mother and next of kin of Patrick Mulhall for causing his death without conscious suffering. The right of recovery was dependent upon section 2 of chapter 270 of the Statutes of 1887. This section declares that when an employé is instantly killed and dies without conscious suffering as the result of the negligence of an employer, or of any person for whose negligence the employer is liable, the widow of the deceased, or if there is no widow, the next of kin, provided that such next of kin is at the time of the death of such employé dependent upon the wages of such employé for support, may

maintain an action for damages therefor, and may recover in the same manner and to the same extent, as if the death of the deceased had not been instantaneous or as if the deceased had consciously suffered. Verdict for the plaintiff, and the defendant alleged exceptions.

W. B. Sprout and G. C. Dickson, for the defendants.

J. W. McAnarney, J. E. Cotter, and J. P. Fagan, for the plaintiff.

²⁶⁶ HOLMES, C. J. This is an action under the Statutes of 1887, chapter 270, section 2, for causing the death of the plaintiff's son. The plaintiff is an Irishwoman who, so far as appears, never has left Ireland. In the superior court she had a verdict, and the case is here on exceptions to a refusal to direct a verdict for the defendants, either on the ground that the statute conferred no rights upon the plaintiff, or on the ground that she did not appear to have been dependent upon the wages of her son for support. Exceptions were taken also upon some matters of evidence.

On the question of the plaintiff's dependence upon her son we are of opinion that there was evidence for the jury. It appeared from declarations of the deceased, properly admitted under the Statutes of 1898, chapter 535, that his mother was very poor, and that he sent over money repeatedly, and regretted not being able to do more. The money, it is true, was received by his father while alive; but the father was a paralytic, and died nearly a year before his son. ²⁶⁷ The plaintiff in her deposition confirmed the statements of her son. She testified that she bought food with his money, among other things, and that she wished she had more to eat.

In answer to the question to what extent, if at all, she was dependent upon her son for support, she answered that she was almost entirely dependent upon him for the last two years. This question was objected to but was admissible. The extent to which particulars may be summed up in a general expression is a matter involving more or less discretion, and cannot be disposed of by the suggestion that the general expression involves the conclusion which the jury is to draw, or that it is law rather than fact: *Poole v. Dean*, 152 Mass. 589, 591, 26 N. E. 406; *Windram v. French*, 151 Mass. 547, 550, 551, 24 N. E. 914. The question to what extent she was dependent upon her son called for details of fact in a perfectly proper way. Whether

the answer showed a sufficient dependence to satisfy the statute remained for the jury to answer under the instructions of the court. Even more plainly admissible were interrogatories whether the son contributed to her support, and if so how much. The plaintiff also testified that she "had to turn around and go three miles to earn [her] support," that she had a boy that was hard set to earn from eight pence to one shilling a day, and another boy an invalid. How far these statements should outweigh the others was for the jury: See *Houlihan v. Connecticut River R. R. Co.*, 164 Mass. 555, 557, 42 N. E. 108; *Daly v. New Jersey Steel etc. Co.*, 155 Mass. 1, 5, 29 N. E. 507; *American Legion of Honor v. Perry*, 140 Mass. 580, 590, 5 N. E. 634. Partial dependence for the necessities of life would be enough, as it is made in terms by the English statute: 60 & 61 Victoria, c. 37, sec. 7, cl. 2; *McCarthy v. Supreme Lodge New England Order of Protection*, 153 Mass. 314, 318, 25 Am. St. Rep. 637, 26 N. E. 866; *Simmons v. White Brothers*, [1899] 1 Q. B. 1005; *Atlanta etc. Air-Line Ry. Co. v. Gravitt*, 93 Ga. 369, 372, 44 Am. St. Rep. 145, 20 S. E. 550. In *Hodnett v. Boston etc. R. R. Co.*, 156 Mass. 86, 30 N. E. 224, there was nothing to show that the plaintiff did not support herself by her own earnings.

We come, then, to the more difficult question, whether the plaintiff can claim the benefit of the act. However this may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts law conferring a right outside her boundary lines. In *Mannville Co. v. Worcester*, 138 Mass. 89, 52 Am. Rep. 261, where a Rhode Island corporation sought to recover for a diversion of waters ²⁶⁸ from its mill in Rhode Island by an act done higher up the stream in Massachusetts, it was held, following earlier decisions, that there was no such impossibility, although the point was strongly urged. It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered. The same principle is recognized without discussion in *Lumb v. Jenkins*, 100 Mass. 527, where a nonresident alien was held entitled to take land by descent. So, after discussion, as to a nonresident's right to sue: *Peabody v. Hamilton*, 106 Mass. 217. So the supreme court of the United States holds that a right to recover for wrongfully causing death under

a state law similar to Lord Campbell's act may be asserted by an administrator appointed in another state: *Dennick v. Central R. R. Co.*, 103 U. S. 11. See 8 Am. & Eng. Ency. of Law, 2d ed., 879, "Death by wrongful act." It is true that the arguments which prevailed in this case did not prevail in *Richardson v. New York Cent. R. R.*, 98 Mass. 85, and perhaps would not have prevailed in England: *Adam v. British etc. S. S. Co.*, 79 L. T., N. S., 31. But so far as the principle for which we cite the case is concerned, it is in accord with our own decisions, assuming that, like Lord Campbell's act, the statute was regarded as conferring a new right of action on the foreign executor or administrator, and not as giving a right of action to the deceased which went to the executor by survival only: *Blake v. Midland Ry.*, 21 L. J. Q. B. 233, 237; *Seward v. Vera Cruz*, 10 App. Cas. 59, 67. The cause of action survived in *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534. This distinction seems to be lost sight of by many of the cases given in the Encyclopedia as following *Dennick v. Central R. R. Co.*, 103 U. S. 11, so that their reasoning is not very satisfactory. But see *Bruce v. Cincinnati R. R. Co.*, 83 Ky. 174, 182 et seq.

The question then becomes one of construction, and of construction upon a point upon which it is probable that the legislature never thought when they passed the act. In view of the decisions to which we have referred, we lay on one side as too absolute some expressions which are to be found in the English ²⁶⁹ cases, and some of which are cited in *Adam v. British etc. S. S. Co.*, 79 L. T., N. S., 31. Our different relation to our neighbors politically and territorially is a sufficient ground for a more liberal rule, at least as to inhabitants of the United States.

One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens: *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *Brannigan v. Union Gold Min. Co.*, 93 Fed. 164. But compare *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200. On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument: *Philpott v. Missouri Pac. R. R. Co.*, 85 Mo. 164, 167; *Chesapeake etc. R. R. Co. v. Higgins*, 85 Tenn. 620, 622, 4 S. W. 47; *Augusta Ry. Co. v. Glover*, 92 Ga. 132, 142, 143, 18 S. E. 406; *Luke v. Calhoun County*, 52 Ala. 115, 118, 120.

Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employé himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain: Stats. 1887, c. 270, sec. 1, cl. 3. In the latter case, there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employés in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in. Whether if the statute were of a different kind we could make a distinction between a mother living just across the ²⁷⁰ boundary line between Massachusetts and Rhode Island and one living in Ireland, need not be considered now.

We are of opinion that the superior court was right in letting the case go to the jury. A similar decision has been rendered upon this statute by the United States circuit court for this district: *Vetaloro v. Perkins*, 101 Fed. 393.

Exceptions overruled.

DEATH, ACTION FOR.—PARTIAL DEPENDENCE on her son will sustain a cause of action by a mother for his wrongful death: See the monographic note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 679.

DEATH, ACTION FOR.—NONRESIDENT ALIENS are not included under a statute giving a right of action for death caused by negligence: *Deni v. Pennsylvania R. R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558. But see the notes to *Attrill v. Huntington*, 14 Am. St. Rep. 353, 354; *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 869-885.

WHICHER v. BOSTON AND ALBANY RAILROAD CO.

[176 Mass. 275, 57 N. E. 601.]

NEITHER RAILWAYS NOR PALACE SLEEPING-CAR COMPANIES OWE TO A PASSENGER, IN REGARD TO BAGGAGE, the duties imposed by law on carriers or innkeepers, where the passenger keeps the baggage in his custody and control. Their only obligation is that of exercising reasonable care, and their liability is restricted to the negligence or misconduct of their servants or agents.

RAILWAYS—PALACE-CAR COMPANIES.—NEGLIGENCE IS NOT INFERABLE on the part of a palace sleeping-car company, its agents or employes, from the mere loss, in the daytime, of the baggage of a passenger left by him or by the porter in his section.

RAILWAYS—PALACE SLEEPING-CAR COMPANIES—NEGLIGENCE OF PASSENGER.—A passenger who, after his traveling-bag is, in the daytime, placed in his section by the porter of a palace sleeping-car company, leaves such bag without attention for five hours, during which time it is stolen, does not exercise reasonable care, and cannot recover of the company.

RAILWAYS.—IN THE RUNNING OF A PALACE SLEEPING-CAR COACH IN THE DAYTIME there is no necessity for the care required when passengers are sleeping. All that is required is reasonable care, and this is not negatived by the loss of a passenger's traveling-bag placed in his section by him or the porter and left there without attention for five hours.

Action against the Boston and Albany Railroad Company and the Wagner Palace Car Company for a traveling-bag. The trial court directed a verdict in favor of the railroad company, but submitted the case to the jury as to the other defendant, and the verdict returned was for the plaintiff. The plaintiff alleged exceptions to the giving of the direction to the jury in favor of the railroad company, and the palace car company to the refusal of the court to direct a verdict in its favor.

A. H. Russell, for the Wagner Palace Car Company.

E. F. McClennen, for the plaintiff.

276 LATHROP, J. There is no material dispute about the facts in this case. The plaintiff was a passenger on a sleeping-car of the Wagner Palace Car Company, which was hauled with other cars from Albany to Boston by the Boston and Albany Railroad Company, leaving Albany at 3 o'clock in the afternoon, and arriving in Boston at 9 in the evening. The Wagner Palace Car Company had no control of the car in so far as its movement over the roadbed was concerned, but retained the internal management thereof, and hired the porter and conductor for

said car. Although there was some discrepancy in the evidence on the point whether the plaintiff carried his traveling-bag to his section, or whether the porter carried it for him, we assume in favor of the plaintiff that the porter carried it for him. The bag was placed in the section nearest the front door of the car. The plaintiff remained by it for ten minutes, and then went into the smoking compartment of the car, which was at the rear end. He remained there half an hour, and then returned to his section, took something out of his bag, and returned to the smoking compartment and remained there until the train was ²⁷⁷ approaching Boston. He then went to his section and his bag was gone. Search was made for it, but it could not be found. The train made three stops between Albany and Boston, namely, at Pittsfield, Springfield, and Worcester. The porter testified that he received one passenger at Pittsfield, but none at the other two stations; that two passengers left the car at Springfield, neither of whom had a hand-bag; that no passengers left at the other stations; and that, while the train was in motion, passengers walked back and forth from the other coaches. He further testified that there were three sleeping-cars on the train, and it appeared that there were also ordinary cars.

The principles of law which govern these cases we consider to be well settled. In the first place, neither a railroad company, a steamboat company, a sleeping-car company, nor a palace-car company owes to a passenger in regard to baggage the duty imposed by law on carriers or innkeepers, where the passenger keeps the baggage in his own custody and control. The only obligation imposed upon them is that of exercising reasonable care, and they are liable only when the loss is due to the negligence or misconduct of the servants or agents of the carrier: Railroads: *Tower v. Utica etc. R. R. Co.*, 7 Hill, 47, 42 Am. Dec. 36; *Henderson v. Louisville etc. R. R. Co.*, 123 U. S. 61, 8 Sup. Ct. Rep. 60; *Illinois Cent. R. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846. Steamboats and steamships: *Clark v. Burns*, 118 Mass. 275, 19 Am. Rep. 456; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Abbott v. Bradstreet*, 55 Me. 530; *American S. S. Co. v. Bryan*, 83 Pa. St. 446; *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716; *The R. E. Lee*, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690. In New York, however, a steamboat is regarded as a floating inn; but we believe this view is peculiar to that state: *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 56 Am. St. Rep. 616, 45 N. E.

369, affirming several earlier cases in that state. Sleeping-cars: *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 273, 58 Am. Rep. 135, 9 N. E. 615; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; *Woodruff etc. Coach Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53, 21 Am. St. Rep. 644, 26 N. E. 277; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr., N. S., 352; *Root v. New York Cent. etc. Co.*, 28 Mo. App. 199. It is obvious that a higher degree of care is required during the night, when ²⁷⁸ a passenger is asleep, than is required in the daytime, when he can look after his own effects: See cases supra. Palace-car day coaches: *Whitney v. Pullman's Palace Car Co.*, 143 Mass. 243, 9 N. E. 619.

It is also well established that the mere loss of an article is not evidence of negligence on the part of the defendant. Something more must be shown: *Carpenter v. New York etc. R. R.*, 124 N. Y. 53, 21 Am. St. Rep. 644, 26 N. E. 277; *Sessions v. New York etc. R. R. Co.*, 78 Hun, 541, 29 N. Y. Supp. 628; *Efron v. Wagner Palace Car Co.*, 59 Mo. App. 641; *Stearn v. Pullman Car Co.*, 8 Ont. 171. In *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 58 Am. Rep. 135, 9 N. E. 615, relied upon by the plaintiff, there were two larcenies the same night, and the porter, who was required to be on duty continuously for thirty-six hours, including two nights, was found asleep in the early morning. These facts were held to be evidence of negligence.

There is no occasion to cite many cases on the point that the plaintiff must show that he was in the exercise of reasonable care. In *Whitney v. Pullman's Palace Car Co.*, 143 Mass. 243, 9 N. E. 619, the plaintiff, a woman, was traveling on a day-car of the defendant company. At Portsmouth she and her husband left the car for ten minutes, leaving her satchel upon the sill of one of the car windows, "a conspicuous and exposed place, which could be reached from the outside through an adjoining window, which was open." It was held that her own negligence contributed to the loss, and that she could not recover: See, also, *Henderson v. Louisville etc. R. R. Co.*, 123 U. S. 61, 8 Sup. Ct. Rep. 60; *Efron v. Wagner Palace Car Co.*, 59 Mo. App. 641.

Applying these principles to the facts of this case, we are of opinion that the judge rightly directed the jury to return a verdict for the railroad company. The plaintiff, instead of having his bag checked, chose to retain the control and custody of it. If it had been lost through any fault or negligence of the agents

or servants of the railroad company, and the plaintiff had been in the exercise of due care, the case would be different.

In *Kinsley v. Lake Shore etc. R. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200, the defendant's servants and agents, while the passengers were at dinner at a way station, removed the sleeping-car, in which the plaintiff and others left their baggage, from the train, and the baggage was put on another car. Part of the ²⁷⁹ plaintiff's baggage was lost in removal. This case differs essentially from the one at bar.

As to the liability of the last-named defendant, we are of opinion that the judge erred in submitting the case to the jury. The bag was in no just sense delivered into the sole custody of this defendant. While its servant was carrying the bag into the car, it may have been in the sole custody of the defendant for the moment, but the plaintiff renewed his custody and control over it. Instead of looking out for it, he abandoned it for over five hours. It seems to us that the case falls clearly within that of *Whitney v. Pullman's Palace Car Co.*, 143 Mass. 243, 9 N. E. 619, and is very similar in its facts to *Efron v. Wagner Palace Car Co.*, 59 Mo. App. 641.

Nor do we see any evidence of a breach of any duty which the last-named defendant owed the plaintiff, or what there was for the jury to pass upon. The car was equipped with its usual force of servants. It was running in the daytime as a day-car. There was no necessity for the care required in a sleeping-car when passengers are asleep. All that was required was the exercise of reasonable care. As has been before stated, the mere loss of the bag was not evidence of a want of such care. There was no evidence of a breach of the defendant's rules by the porter, as in the case of *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315, 47 N. E. 1024. The porter in the case before us, for aught that appears, in every way performed his duty, and we see no ground for holding the last-named defendant responsible.

The result is that the plaintiff's exceptions must be overruled; and the exceptions of the last-named defendant be sustained.

So ordered.

SLEEPING-CAR COMPANIES are not held to the responsibility of common carriers and innkeepers: *Pullman etc. Co. v. Adams*, 120 Ala. 581, 74 Am. St. Rep. 53, 24 South. 921.

A SLEEPING-CAR COMPANY IS NOT LIABLE as an insurer to a passenger for the loss by theft of property retained in his possession, but it owes him the duty to exercise reasonable care to guard it from being stolen: *Pullman etc. Co. v. Hall*, 106 Ga. 765,

71 Am. St. Rep. 293, 32 S. E. 923. From the mere fact of loss of property by a passenger in a sleeping-car, negligence on the part of the company cannot be presumed, and contributory negligence on the part of the passenger defeats his right of recovery: See the monographic note to Pullman etc. Co. v. Lowe, 26 Am. St. Rep. 335, 336.

ANGUS v. SCULLY.

[176 Mass. 357, 57 N. E. 674.]

PART PERFORMANCE—RECOVERY FOR WHEN COMPLETE PERFORMANCE BECOMES IMPOSSIBLE.—One engaged to make repairs or do other work on the house of another under a special contract, when the completion of his contract becomes impossible on account of the destruction of the house without his fault, may recover for what he has done.

Action of contract on account for moving building. Verdict for the plaintiff, and the defendant alleged exceptions.

J. H. Hurley, for the defendant.

E. B. Hale, for the plaintiffs.

³⁵⁷ HAMMOND, J. The contract was that the plaintiffs should move a large building belonging to the defendant from a lot on Third street to a lot on First street, and also to change the ³⁵⁸ location of two other buildings, of which one was on the First street lot and one on the Third street lot, and the defendant was to pay them eight hundred and forty dollars.

In accordance with the agreement the plaintiffs began the work. "They first moved the house on the Third street lot, and then began to move the large building from the Third street lot across certain open lots toward the lot on First street. When said last-named building had been moved about half the distance to said lot on First street, it was entirely consumed by fire at some time during the night, and thereupon, with the assent of the defendant, no further work was done in moving either of the other buildings."

In this action the plaintiffs seek to recover the fair value of the services rendered by them in the work done down to the time of the fire.

The court refused to rule as requested by the defendant that the plaintiffs could not recover, and submitted the case to the jury upon instructions which would authorize them to find for

the plaintiffs, if they were satisfied that the fire was not attributable to any negligence of the plaintiffs.

We see no error in the rulings under which the case thus went to the jury.

Clearly, one of the implied conditions of the contract was that the building should continue to exist. Upon the destruction of the building the work could not be completed according to the contract. Authorities differ as to the rights of the parties in such a case, but so far as respects this commonwealth the rule is well settled. As stated by Knowlton, J., in *Butterfield v. Byron*, 153 Mass. 517, 523, 25 Am. St. Rep. 654, 27 N. E. 667: "The principle seems to be, that when, under an implied condition of the contract, the parties are to be excused from performance if a certain event happens, and by reason of the happening of the event it becomes impossible to do that which was contemplated by the contract, there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for it its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable."

Stated more narrowly and with particular reference to the circumstances ³⁵⁹ of this case, the rule may be said to be that where one is to make repairs or do any other work on the house of another under a special contract, and his contract becomes impossible of performance on account of the destruction of the house without any fault on his part, then he may recover for what he has done.

This case comes clearly within this rule: *Lord v. Wheeler*, 1 Gray, 282; *Butterfield v. Byron*, 153 Mass. 517, 25 Am. St. Rep. 654, 27 N. E. 667, and cases therein cited.

Exceptions overruled.

CONTRACT — DESTRUCTION OF SUBJECT MATTER. — A workman can recover nothing under an entire contract for the building of a house which is destroyed by fire before completion, but it is otherwise if the contract is not entire: See the monographic note to *Huyett etc. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 285; *Nicol v. Fitch*, 115 Mich. 15, 69 Am. St. Rep. 542, 52 N. W. 988.

RICHARDSON v. DANVERS.

[176 Mass. 413, 57 N. E. 688.]

A BICYCLE IS NOT A CARRIAGE within the meaning of a statute requiring towns and cities to keep highways in repair, so that the same may be reasonably safe and convenient for travelers with their horses, teams, and carriages. The rider of a bicycle, therefore, cannot recover for injuries received by him and due to a depression in the road.

Action of tort for personal injuries. The defendant requested the court to rule that a bicycle was not a carriage within the meaning of the statute, but the court refused so to do, and the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

D. N. Crowley, for the defendant.

H. P. Moulton, for the plaintiff.

413 LATHROP, J. The plaintiff, while riding a bicycle on a highway which the defendant was bound to keep in repair, encountered a depression in the way, and fell from her wheel and was injured. The jury returned a verdict in her favor, and the case comes before us on several exceptions to the exclusion of evidence, and to the refusal of the court to rule that a bicycle is not a carriage within the meaning of the Public Statutes, chapter 52, section 1.

The statute in question provides that highways and other ways named shall be kept in repair, at the expense of the town, city, or place where they are situated, "so that the same may be reasonably safe and convenient for travelers, with their horses, teams, and carriages at all seasons of the year." This statute was enacted in 1786, and has been in force ever since: Stats. 1786, c. 81, sec. 1; Rev. Stats., c. 25, sec. 1; Gen. Stats., c. 44, sec. 1; Stats. 1877, c. 234.

The question then is, whether a bicycle is a carriage within the meaning of this term in the statute.

We have no doubt that for many purposes a bicycle may be **414** considered a vehicle or a carriage. It may be lawfully used on the highway, and is subject to the law of the road: State v. Collins, 16 R. I. 371, 17 Atl. 131; Meyers v. Hinds, 110 Mich. 300, 64 Am. St. Rep. 345, 68 N. W. 156; Taylor v. Union Traction Co., 184 Pa. St. 465, 40 Atl. 159; Thompson v. Dodge, 58 Minn. 555, 49 Am. St. Rep. 533, 60 N. W. 545.

So, under a law prohibiting a person from riding or driving any sort of carriage furiously: *Taylor v. Goodwin*, 4 Q. B. Div. 228. So, under laws or ordinances prohibiting driving on the sidewalk: *Regina v. Justin*, 24 Ont. 327; *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76, 20 N. E. 132; *Commonwealth v. Forrest*, 170 Pa. St. 40, 32 Atl. 652. Under a law permitting the collection of tolls on a turnpike a bicycle was held to be a carriage: *Geiger v. Perkiomen etc. Turnp. Road Co.*, 167 Pa. St. 582, 31 Atl. 918. The opposite was held in *Williams v. Ellis*, 5 Q. B. Div. 175, and in *Murfin v. Detroit etc. Plank-Road Co.*, 113 Mich. 675, 67 Am. St. Rep. 489, 71 N. W. 1108. And in Scotland, in an action on a policy of insurance, it was held that a person riding a bicycle was not "traveling as an ordinary passenger" in a vehicle": *M'Millan v. Sun Life Assur. Co.*, 4 Scots L. T. 98.

The statute in question was passed long before bicycles were invented, but, although, of course, it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles ejusdem generis, and that it does not extend to bicycles. This view is favored by the provision in the Public Statutes, chapter 52, section 18, which provides that no damage shall be recovered "by any person whose carriage and the load thereon shall exceed the weight of six tons." The words last quoted were first added by the Statutes of 1838, chapter 104. It seems to us that the legislature, by the use of the word "carriage," had in view a vehicle which could carry passengers or inanimate matter, not to exceed with its load more than six tons.

As was said in *State v. Missouri Pac. Ry. Co.*, 71 Mo. App. 385, 393: "While the terms in question are flexible and may include the new uses, falling within the legitimate scope of their meaning, which arise in the growth of society, we are not warranted in giving them a new meaning so as to cover different subjects not within the principle upon which they are founded. To do this would be judicial legislation."

A bicycle is more properly a machine than a carriage; and so it is defined in *Murray's Dictionary*. It is also so considered in the Statutes of 1894, chapter 479, which is an act to regulate the use of bicycles ⁴¹⁵ and similar vehicles, and in the amendatory act of 1898: Stats. 1898, c. 121. In each of these acts it is called a machine.

A bicycle is of but little use in wet weather or on frozen ground. Its great value consists in the pneumatic tire; but

this is easily punctured, and no one who uses a wheel thinks of taking a ride of any distance without have his kit of tools with him. A hard rut, a sharp stone, a bit of coal or glass, or a tack in the road may cause the tire to be punctured, and this may cause the rider to fall and sustain an injury. It may impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety.

It is because ordinary roads are not considered suitable for bicycles that cities and towns are given the power by the Statutes of 1898, chapter 351, to lay out, construct, and maintain paths for bicycles. And the Statutes of 1899, chapter 474, makes it a misdemeanor to trespass upon a cycle path by driving thereon with a horse or other animal, except to cross the same.

We are, therefore, of opinion that a bicycle is not a carriage within the meaning of that term in the Public Statutes, chapter 52, section 1. This view of the case renders it unnecessary to consider the other exceptions.

Exceptions sustained.

A BICYCLE IS A VEHICLE: *Meyers v. Hinds*, 110 Mich. 300, 64 Am. St. Rep. 345, 68 N. W. 156; *Thompson v. Dodge*, 58 Minn. 555, 49 Am. St. Rep. 533, 60 N. W. 545; note to *Holland v. Bartch*, 16 Am. St. Rep. 314.

HARRIS v. STARKEY.

[176 Mass. 445, 57 N. E. 698.]

ESTATES OF DECEDENTS—DECREES OF DISTRIBUTION—RELIEF FROM.—If a decree of distribution omits one of the heirs at law of the decedent through ignorance or mistake on the part of the executor and the probate judge, and such heir had no notice or knowledge of the probate of the will or the application for distribution, the court may, on his petition, grant him relief by giving him a right to recover of the other heirs the sums received by them in excess of their shares.

Petition to the probate court for a revision of the order for the distribution of the estate of Daniel P. Kingsley, deceased. The petition was dismissed at the hearing before Knowlton, judge, who reported the case for the consideration of the full court.

J. L. Rice, for the appellant.

F. E. Carpenter, for the appellee.

446 MORTON, J. The appellant was one of the heirs at law of Daniel P. Kingsley, who died testate, and as such was entitled to one eleventh part of the rest and residue of his estate. Through ignorance and mistake on the part of the executor and the judge of the probate court she was not named in the decree of distribution as one of the persons amongst whom the rest and residue was to be divided. She herself had no notice or knowledge of the probate of the will of said Kingsley, nor of the application for an order of distribution, nor of the proceedings thereon, nor of the payments made by the executor under the decree of distribution, nor of the account rendered by him of such payments and its allowance, till long after all these things had been done. This is a petition by her that the order of distribution be modified so that the executor shall be directed to distribute the funds to her and the others named in the order—one-eleventh to each. The petition was dismissed in the probate court. An appeal was taken by her, and the case comes before us on a report from the single justice who heard the case, and who directed the decree of distribution to be so modified that payment should be made to the appellant and the ten others named in the decree in equal shares of one-eleventh each. But in the decree which he ordered to be entered he directed that the decree should not require the executor to take further action, nor impose upon him any liability, but should take effect only to correct the errors of the former decree and establish the right of the petitioner to a distributive share as against the other distributees to whom payments had been made, and to give to her and to the executor such rights as against such other distributees as might arise from the correction of these errors.

It is manifest that the appellant will be without a remedy unless she can maintain this petition. She cannot attack the **447** former decree collaterally, and from the nature of the proceedings it will be conclusive and binding upon her so long as it stands unrevoked and unmodified, even though she may have had no actual notice of the proceedings. The executor is protected from liability by it and by the return and allowance after due notice of his account containing the payments made by him pursuant to the decree. And the only way in which the appellant can procure a revision or modification of it is by proceedings instituted in the probate court for that purpose:

Loring v. Steineman, 1 Met. 204; Pierce v. Prescott, 128 Mass. 140; McKim v. Doane, 137 Mass. 195; Shores v. Hooper, 153 Mass. 228, 232, 26 N. E. 846; Bonnemort v. Gill, 167 Mass. 338, 45 N. E. 768.

It is too well settled to require discussion or consideration that the probate court has the power to correct errors or mistakes in its decrees: Waters v. Stickney, 12 Allen, 1, 90 Am. Dec. 122; Cleveland v. Quilty, 128 Mass. 578; Gale v. Nickerson, 144 Mass. 415, 11 N. E. 714; Tucker v. Fisk, 154 Mass. 574, 28 N. E. 1051. And the present case seems to us to be an eminently proper one for the exercise of that power. It is found that the appellant was one of the heirs of the testator. As such she was entitled to a share of the rest and residue. Through no fault or negligence of her own her name was not included amongst the distributees. The other distributees have received the share which belonged to her. Unless the decree is modified and corrected as proposed they will be permitted to retain funds to which, as against this appellant, they are not justly entitled, and to which the only claim that they have is by virtue of a payment made to them by the executor pursuant to a decree founded as between this appellant and them in ignorance and mistake on the part of the executor and the judge of the probate court. It needs no argument, we think, to show that under such circumstances the decree should be revised and corrected, so far as can be done without imposing any liability on the executor. The decree ordered to be entered by the single justice avoids that, and establishes the right of the appellant to a distributive share as between her and the other distributees, and gives her and the executor such rights against them as arise from a correction of the errors in the former decree; thus enabling the executor and her to take steps against them for the recovery of the share to which she is held to be ⁴⁴⁸ entitled, without being met by the objection that she has no right to a distributive share under the decree of distribution.

As the report stands we see no ground on which laches can be imputed to the appellant, and we think that a decree as ordered by the single justice should be entered.

So ordered.

DISTRIBUTION, VACATING DECREE OF.—If a decree of distribution has been made, but before distribution a legatee, not known to be in existence, appears, the court may vacate the proceedings: See the monographic note to Green v. Creighton, 48 Am. Dec. 750.

CLINTON v. NORFOLK MUTUAL FIRE INSURANCE COMPANY.

[176 Mass. 486, 57 N. E. 998.]

INSURANCE.—THE BURDEN OF PROVING THE BREACH OF A CONDITION of a policy of insurance which has once attached is on the insurer.

INSURANCE—INCREASE OF RISK.—There is no presumption that a transfer by the insured of all his interest in the property except a life estate increases the risk.

INSURANCE—TRANSFER OF INTEREST WHICH WILL NOT DEFEAT.—A transfer by the insured of less than his entire interest in the property does not defeat the policy.

INSURANCE—CONDITION AGAINST SALE.—A condition in a policy of insurance against loss by fire that the policy shall be void if, without the consent of the insurer, the property shall be sold, does not apply to a transfer by which the insured reserved a life estate to himself. This condition refers only to an absolute transfer of the entire interest of the insured completely divesting him of all his insurable interest.

INSURANCE—ALIENATION OF ONE OF TWO PARCELS OF INSURED PROPERTY.—If a policy insuring a house and barn against loss by fire provides that it shall be void if the property is sold without the consent of the insurer, a sale of the barn does not affect the right to recover for the loss of the house. The condition applies only upon the sale of the entire property, though, after the sale of the barn, its former owner cannot recover for its subsequent destruction because of his want of insurable interest at that time.

Action to recover upon a policy of insurance. On January 1, 1894, the plaintiff was the owner of certain real property with a dwelling-house and barn thereon, and he then made written application to the defendant company for, and it subsequently issued to him, a policy wherein it insured the dwelling-house and barn against loss by fire in the sum of twelve hundred dollars, of which four hundred dollars were on the barn and the balance on the house. The policy declared that it should be void if, without the consent of the defendant, "the situation or circumstances affecting the risk shall, by or with the knowledge, adverse agency, or consent of the insured, be so altered as to cause an increase of such risks" or "the said property shall be sold." In June following, the plaintiff, then being seventy-six years of age, conveyed all the property to one Forbes, reserving, however, during plaintiff's life "the dwelling-house on said parcel, together with one acre of land surrounding said dwelling-house, but not including in said acre the land on which the barn stands." In the following August, the dwelling-house was wholly destroyed while occupied

by the plaintiff as a life tenant. The value of his interest in it at the time of loss was conceded to be one hundred and forty-eight dollars and eighty cents. The case was submitted on appeal upon an agreed statement of facts.

T. E. Grover, for the plaintiff.

Asa P. French, for the defendant.

488 HAMMOND, J. By his deed to Forbes the plaintiff conveyed all his interest in the buildings insured except an estate for his life in the house. This life estate was carved out of the fee previously owned by him, and was held by the same title as before the conveyance. He sold his entire interest in the barn, but only part of his interest in the house. The only question is whether the policy was thereby avoided as to his remaining interest in the house.

The defendant contends that the policy is thus avoided, and relies upon the clauses which provide that it shall be void if, without the consent of the defendant, "the situation, or circumstances affecting the risk, shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold."

So far as respects the change of circumstances or situation, nothing appears except the deed to Forbes. The burden of proof to show a breach of condition of a policy which has once attached is on the defendant: *Orrell v. Hampden Ins. Co.*, 13 Gray, 431; and even if the clause has reference to what are sometimes called the moral elements of the risk, we cannot say, upon the facts appearing before us, that the risk was increased by the sale, or that the clause was intended to embrace the changes made by sale, especially when there is an express provision in the policy relating to that subject: *Powers v. Guardian Ins. Co.*, 136 Mass. 108, 49 Am. Rep. 20. Compare, also, *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164.

The defense must, therefore, rest upon the clause as to alienation. Many of the earlier policies of fire insurance contained no condition against alienation. Inasmuch, however, as the contract of insurance is one of indemnity and not a wager, it is manifest that where, before the fire, the insured had parted with his entire interest in the property insured, he suffered no loss by its destruction and needed no indemnity. A total transfer of his interest, therefore, defeated the policy. But any change short of a complete transfer of his entire interest did not have

that ⁴⁸⁹ effect. The general rule was and is that, in the absence of any provision to the contrary in the policy, any change in the insurable interest of the insured, whether by a complete sale of only a part of the property, or a change in the title to a part or the whole of the property, does not avoid the policy which has once attached, provided that at the time of the loss the insured has an insurable interest. It is necessary that there should be an insurable interest at the time of the contract and at the time of the loss, but if at the time of the loss the insured has parted with only a part of his interest, the policy is valid as to the part retained: *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76; *Scanlon v. Union F. Ins. Co.*, 4 Biss. 511, Fed. Cas. No. 12,436; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551, 20 Am. Rep. 583; *Stetson v. Massachusetts Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68. And see further the cases cited in 13 Am. & Eng. Ency. of Law, 2d ed., 240, and notes. And even a total alienation does not avoid, but only suspends, the policy, so that if the insured regains his interest or any part of it, and holds it at the time of the loss, he may recover: *May on Insurance*, sec. 101; *Worthington v. Bearse*, 12 Allen, 382, 90 Am. Dec. 152.

In this state of the law insurers began to insert in the policies clauses relating to alienation. These clauses vary in language, and in the examination of the cases on this subject considerable care must be exercised in order to discriminate properly between those cases applicable and those not applicable to the clause which may be under consideration.

The clause in this policy is if "the said property shall be sold." Conditions of this kind are strictly construed against the insurer, and the general rule is that such a condition refers only to an absolute transfer of the entire interest of the insured, completely divesting him of his insurable interest. Any sale or transfer short of this is not within the scope of the condition. See, in addition to the cases above cited, *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. 454; *Holbrook v. American Ins. Co.*, 1 Curt. C. C. 193, Fed. Cas. No. 6,589; *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665; and the cases collected in 13 Am. & Eng. Ency. of Law, 2d ed., 241, and notes.

If it be the intention of the insurers that the contract should be avoided by any partial sale, or by any change short of an absolute sale of the entire interest, there is no difficulty in ⁴⁹⁰

expressing that intent in plain and explicit language, and in many policies such an intention is thus expressed: See *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164, where the condition was that the policy should be void if the property insured should be sold or conveyed in whole or in part.

As an illustration of the different results arising from the difference in the language of the clauses as to alienation, compare the case of *Foote v. Hartford Ins. Co.*, 119 Mass. 259, and *Bryan v. Traders' Ins. Co.*, 145 Mass. 389, 14 N. E. 454. In the former case, where the condition was that the policy should be void if any change should take place in the title or possession of the property insured, whether by sale, transfer, or conveyance, legal process or judicial decree, it was held that a mortgage by way of an absolute deed and an unrecorded instrument of defeasance back was a violation of the condition, while in the latter case it was held that such a mortgage did not avoid the policy where the condition was that the policy should be avoided if "the said property shall be sold."

If, therefore, the house had been the only building named in the policy, or if the policy can be regarded as containing two separate and independent contracts, one applicable to the house alone, and one applicable to the barn alone, there was no breach of the condition of alienation so far as respects the house, and the policy was valid as to the life estate of the plaintiff therein at the time of the loss: *Clark v. New England Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44.

But it is contended by the defendant that the contract was entire, and that being void as to the barn it is void as to the house. And the counsel for the defendant argues that, in so far as the case of *Clark v. New England Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44, seems to support the doctrine that where the different articles are separately valued in a policy it is to be regarded as containing a separate, distinct, and independent contract as to each such article, as though each was insured in a separate policy, it is inconsistent with *Brown v. People's Ins. Co.*, 11 Cush. 280, and *Thomas v. Commercial Union Assur. Co.*, 162 Mass. 29, 44 Am. St. Rep. 323, 37 N. E. 672, and other similar cases decided here and elsewhere. We have not found it necessary, however, to consider whether or not the contract in this case is an entire contract, since we are of the ⁴⁹¹ opinion that, even if it be entire, there has been no breach of the condition. If the contract was entire, then the house and barn were insured as one entire risk, and the same con-

siderations which lead to the conclusion that where the house is the only building insured there is no sale within the condition named in the policy, when the insured retains an insurable interest in the house, leads also to the conclusion that where the house and barn are insured as one entire risk there is no sale of the property within the condition when the insured retains an insurable interest in either building. In either case there has not been an absolute sale of the entire interest in the whole property, and consequently no breach of the condition. And the reason the plaintiff cannot recover for the destruction of the barn is not because there has been a breach of the condition as to alienation, and the policy has therefore become void, but because he had no insurable interest in the barn when it was burned, and has therefore suffered no loss by its destruction. The result would be the same even if there was no condition whatever as to alienation, or if the plaintiff had lost his interest in some way not covered by the condition.

It is true that often the condition in a policy covering several buildings which is regarded as an entire contract is broken when trouble arises as to one building alone, or even a part of one. In *Thomas v. Commercial Assur. Co.*, 162 Mass. 29, 44 Am. St. Rep. 323, 37 N. E. 672, for instance, it was held that a misdescription as to one of the buildings covered by one entire contract was a misdescription of the property insured, and the policy was held void as to all the buildings. Of course, the description of the whole property covered by the risk could not be correct, so long as it was incorrect as to any particular building; and the principle of this decision is of very general application in the law of insurance, whether the policy be avoided for a breach of a condition or for fraud, or other cause applicable to contracts in general: *Brown v. People's Ins. Co.*, 11 Cush. 280.

On the other hand, in *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 20 Am. St. Rep. 179, 12 S. W. 498, where the policy covered two buildings, and contained a provision that it should be void if the premises should become vacant or unoccupied, and it appeared that at the time of the fire one of the buildings only was occupied, it was held that the ⁴⁹² contract and risk were entire, and therefore the premises could not be regarded as unoccupied so long as one of the buildings was occupied, and there was no reason why the plaintiff should not recover for the loss of both.

These two classes of decisions are perfectly consistent with each other. The last case somewhat resembles in principle the case at bar. Since in this case there has been no breach of the condition of the policy, the plaintiff may recover the value of his life interest at the time of his loss, which by the agreement of the parties was one hundred and forty-eight dollars and eighty cents, with interest from the date of the writ.

Judgment for the plaintiff accordingly.

AN ALIENATION OF INSURED PROPERTY, to avoid the policy, must be absolute: *Power v. Ocean Ins. Co.*, 19 La. Ann. 28, 36 Am. Dec. 665; if an insurable interest in the property is retained, it will be protected by the policy: See the monographic note to *Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 155; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176, 85 Am. Dec. 553. Alienation of one of two houses insured in the same policy, but valued and insured separately, avoids the policy only as to the house alienated: *Clark v. New England etc. Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44. See, further, *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289, 80 Am. Dec. 573; note to *Lane v. Maine etc. Ins. Co.*, 28 Am. Dec. 155, 156.

PLANT v. WOODS.

[176 Mass. 492, 57 N. E. 1011.]

LABOR UNIONS—UNLAWFUL ATTEMPT OF ONE TO COERCE AND CONTROL ANOTHER.—A general scheme on the part of a labor union and its members to compel the members of another union to desert it and become members of the former, and, if necessary to that end, to threaten employes and cause them to believe there would be trouble and strikes or boycotts if they continue their employment unless the members abandon their labor union and join the other, is unlawful, and the further prosecution of the scheme may be enjoined at the instance of the members of the union against which the scheme is aimed. It is not material that no violence has been resorted to, and that the persons, in pursuing their unlawful scheme, have been courteous in their manners.

LABOR UNIONS—UNLAWFUL INTERFERENCE WITH LABOR—WHAT IS.—Every person has a right, under the law, as between him and his fellow-citizens, to full freedom in disposing of his own labor or his own capital according to his will. Every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description done, not in the exercise of the actor's own right, but for the purpose of obstruction, is, if damage be caused thereby to the party obstructed, a violation of this prohibition.

Suit by the officers and members of one labor union of painters and decorators against the officers and members of an-

other union to restrain the defendants from any action or the use of any methods tending to prevent the plaintiffs from securing or continuing in their employment. The trial judge decreed in favor of the plaintiffs as follows: "This cause came on to be heard, and was argued by counsel; and thereupon, on consideration thereof, it is ordered, adjudged, and decreed that the defendant association, the defendants, and each and every of them, their committees, agents, and servants, be restrained and strictly enjoined from interfering and from combining, conspiring, or attempting to interfere, with the employment of members of the plaintiffs' said association, by representing or causing to be represented in express or implied terms, to any employer of said members of plaintiffs' association, or to any person or persons or corporation who might become employers of any of the plaintiffs, that such employers will suffer or are likely to suffer some loss or trouble in their business for employing or continuing to employ said members of plaintiffs' said association; or by representing, directly or indirectly, for the purpose of interfering with the employment of members of the plaintiffs' said association, to any who have contracts or may have contracts for services to be performed by employers of members of plaintiffs' said association, that such persons will or are likely to suffer some loss or trouble in their business for allowing such employers of members of plaintiffs' said association (and because they are such employers) to obtain or perform such contracts; or by intimidating, or attempting to intimidate, by threats, direct or indirect, express or implied, of loss or trouble in business, or otherwise, any person or persons or corporation who now are employing or may hereafter employ or desire to employ any of the members of the plaintiffs' said association; or by attempting by any scheme or conspiracy, among themselves or with others, to annoy, hinder, or interfere with, or prevent any person or persons or corporation from employing or continuing to employ a member or members of plaintiffs' said association; or by causing, or attempting to cause, any person to discriminate against any employer of members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer; and from any and all acts, or the use of any methods, which by putting or attempting to put any person or persons or corporation in fear of loss or trouble, will tend to hinder, impede, or obstruct members, or any member, of the plaintiffs' said association from securing employment or continuing in employment.

And that the plaintiffs recover their costs, taxed as in an action of law." The case was, at the request of both parties, reported to the supreme court for its determination.

W. R. Heady and J. W. Flannery, for the plaintiffs.

W. H. McClintock and J. B. Carroll, for the defendants.

⁴⁹⁴ HAMMOND, J. This case arises out of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them is that the plaintiff union is affiliated with a national organization having its headquarters in Lafayette, in the state of Indiana, while the defendant union is affiliated with a similar organization having its headquarters in Baltimore, in the state of Maryland. The plaintiff union was composed of workmen who in 1897 withdrew from the defendant union.

There does not appear to be anything illegal in the object of either union as expressed in its constitution and by-laws. The defendant union is also represented by delegates in the Central Labor Union, which is an organization composed of five delegates from each trade union in the city of Springfield, and had in its constitution a provision for levying a boycott upon a complaint made by any union.

The case is before us upon a report after a final decree in favor of the plaintiffs, based upon the findings stated in the report of the master.

The contest became active early in the fall of 1898. In September of that year, the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be nonunion men," and voted to "notify the bosses" of that declaration. The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs and each of them to join ⁴⁹⁵ the defendant association, peaceably if possible, but by threat and intimidation if necessary. Accordingly, on October 7th, they voted that "if our demands are not complied with, all men working in shops where Lafayette people are employed refuse to go to work." The plaintiffs resisting whatever persuasive measures, if any, were used by the defendants, the latter proceeded to carry out their plan in the

manner fully set forth in the master's report. Without rehearsing the circumstances in detail it is sufficient to say here that the general method of operations was substantially as follows:

A duly authorized agent of the defendants would visit a shop where one or more of the plaintiffs were at work and inform the employer of the action of the defendant union with reference to the plaintiffs, and ask him to induce such of the plaintiffs as were in his employ to sign applications for reinstatement in the defendant union. As to the general nature of these interviews the master finds that the defendants have been courteous in manner, have made no threats of personal violence, have referred to the plaintiffs as nonunion men, but have not otherwise represented them as men lacking good standing in their craft; that they have not asked that the Lafayette men be discharged, and in some cases have expressly stated that they did not wish to have them discharged, but only that they sign the blanks for reinstatement in the defendant union. The master, however, further finds, from all the circumstances under which those requests were made, that the defendants intended that employers of Lafayette men should fear trouble in their business if they continued to employ such men, and that employers to whom these requests were made were justified in believing that a failure on the part of their employes who were Lafayette men to sign such reinstatement blanks, and a failure on the part of the employers to discharge them for not doing so, would lead to trouble in the business of the employers in the nature of strikes or a boycott, and the employers to whom these requests were made did believe that such results would follow, and did suggest their belief to the defendants, and the defendants did not deny that such results might occur; that the strikes which did occur appear to have been steps taken by the defendants to obtain the discharge of such employes as were Lafayette men who declined to sign application ⁴⁹⁶ blanks for reinstatement; that these defendants did not in all cases threaten a boycott of the employers' business, but did threaten that the place of business of at least one such employer would be left off from a so-called "fair list" to be published by the Baltimore Union. The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette Union to join the Baltimore Union, and as a means

to this end they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business.

We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and to carry out their purpose have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. It matters not that this request to discharge has not been expressly made. There can be no doubt, upon the findings of the master and the facts stated in his report, that the compulsory discharge of the plaintiffs in case of non-compliance with the demands of the defendant union is one of the prominent features of the plan agreed upon.

It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may "expect trouble in his business." It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will, by strong, persistent, and organized persuasion and social pressure of every description, do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practiced by organized labor will be made to injure him in his business, even to his ruin, if possible; and that, by the use of vile and opprobrious ⁴⁹⁷ epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself.

However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even

if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business, except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally or even answerable civilly in damages to those who suffer, still with full knowledge of what is to be expected they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those—whether their employer or fellow-workmen—against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realized until all those probable consequences are considered. Such is the nature of the threat, and such the degree of coercion and intimidation involved in it.

If the defendants can lawfully perform the acts complained of in the city of Springfield, they can pursue the plaintiffs all over the state in the same manner, and compel them to abandon their trade or bow to the behests of their pursuers.

It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this, as in every other case of equal rights, the right of each individual is to be exercised with due regard to the similar ⁴⁹⁸ right of all others, and the right of one be said to end where that of another begins.

The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. Sir William Erle, in his book on Trade Unions, page 12, has stated this in the following language, which has been several times quoted with approval by judges in England: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right com-

prised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition.”

The same rule is stated with care and discrimination by Wells, J., in *Walker v. Cronin*, 107 Mass. 555, 564: “Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance, or loss, come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing.”

In this case the acts complained of were calculated to cause damage to the plaintiffs, and did actually cause such damage; and they were intentionally done for that purpose. Unless, therefore, there was justifiable cause, the acts were malicious and unlawful: *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, and cases cited therein.

The defendants contend that they have done nothing unlawful, and, in support of that contention, they say that a person⁴⁹⁹ may work for whom he pleases; and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice of his intention in advance, with or without stating the reason; that what one man may do several men acting in concert may do, and may agree beforehand that they will do, and may give notice of the agreement; and that all this may be lawfully done notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employés, and that such a result was intended. In a general sense, and without reference to exceptions arising out of conflicting public and private interests, all this may be true.

It is said also, that where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in [1898] App. Cas. 1, as follows: “An

act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate.

In so far as a right is lawful, it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor, as where one digs upon his own land for water (*Greenleaf v. Francis*, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra v. Bourges*, 141 Mass. 7, 4 N. E. 623), but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive ⁵⁰⁰ alone, and sometimes in the circumstances and motive combined.

This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel and of procuring a wife to leave her husband: *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, and cases therein cited. Indeed, the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent: See on this an instructive article in 8 *Harvard Law Review*, 1, where the subject is considered at some length.

It is manifest that not much progress is made by such general statements as those quoted above from *Allen v. Flood*, [1898], App. Cas. 1, whatever may be their meaning.

Still standing for solution is the question, Under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent?

In cases somewhat akin to the one at bar this court has had occasion to consider the question how far acts, manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause such injury and partly in reliance upon such coercion, are justifiable.

In *Bowen v. Matheson*, 14 Allen, 499, it was held to be lawful for persons engaged in the business of shipping seamen to combine together into a society for the purpose of competing with other persons engaged in the same business, and it was held lawful for them, in pursuance of that purpose, to take men out of a ship, if men shipped by a nonmember were in that ship; to refuse to furnish seamen through a nonmember; to notify the public that they had combined against nonmembers, and had "laid the plaintiff on the shelf"; to notify the plaintiff's customers and friends that the plaintiff could not ship seamen for them; and to interfere in all these ways with the business of the plaintiff as a shipping agent, and compel him to abandon the same. The justification for these acts, so injurious to the business of the plaintiff and so intimidating in their nature, is to be found in the law of competition. No legal right of the plaintiff was infringed upon, and, as stated by Chapman, J., in giving the opinion of the court (page 503), "if their effect is ⁵⁰¹ to destroy the business of shipping-masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits." The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed in that case, even to the injury of their rivals.

Similar decisions have been made in other courts where acts somewhat coercive in their nature and effect have been held justifiable under the law of competition: *Mogul Steamship Co. v. McGregor*, [1892] App. Cas. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119; *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1.

On the other hand, it was held in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him which he is under no legal obligation to pay, by inducing his workmen to leave him, or by deterring others from entering into his employ, or by threatening to do this so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the demands, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back. Chapman, C. J., speaking for the court, says that there is no doubt that, if the parties

under such circumstances succeed in injuring the business of the mechanic, they are liable to pay all the damages done to him.

That case bears a close analogy to the one at bar. The acts there threatened were like those in this case, and the purpose was, in substance, to force the plaintiff to give his work to the defendants, and to extort from him a fine because he had given some of his work to other persons.

Without now indicating to what extent workmen may combine and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow-workmen, we think this case must be governed by the principles laid down ⁵⁰² in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. As stated by Lord Bramwell in *Regina v. Druitt*, 10 Cox C. C. 592, 600: "No right of property, or capital, . . . was so sacred, or so carefully guarded by the law of this land, as that of personal liberty. . . . That liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body."

It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter against their will to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will.

The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them.

The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our law.

⁵⁰³ The language used by this court in *Carew v. Rutherford*, 106 Mass. 1, 15, 8 Am. Rep. 287, may be repeated here with emphasis, as applicable to this case: "The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both": See, in addition to the authorities above cited, *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Sherry v. Perkins*, 147 Mass. 212, 214, 9 Am. St. Rep. 689, 17 N. E. 307; *Vegelahn v. Guntner*, 167 Mass. 92, 97, 57 Am. St. Rep. 443, 44 N. E. 1077; Stats. 1894, c. 508, sec. 2; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Lucke v. Clothing etc. Assembly*, 77 Md. 396, 39 Am. St. Rep. 421, 26 Atl. 505.

As the plaintiffs have been injured by these acts, and there is reason to believe that the defendants contemplate further proceedings of the same kind which will be likely still more to injure the plaintiffs, a bill in equity lies to enjoin the defendants: *Vegelahn v. Guntner*, 167 Mass. 92, 97, 57 Am. St. Rep. 443, 44 N. E. 1077.

Some phases of the labor question have recently been discussed in the very elaborately considered case of *Allen v. Flood*, [1898] App. Cas. 1. Whether or not the decision made therein is inconsistent with the propositions upon which we base our decision in this case, we are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges, which view, it may be remarked, was entertained not only by three of the

nine lords who sat in the case, but also by the great majority of the common-law judges who had occasion officially to express an opinion.

There must be, therefore, a decree for the plaintiffs. We think, however, that the clause, "or by causing or attempting to cause, any person to discriminate against any employer of members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer," is too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts; and for that reason, and also because so far as respects unlawful ⁵⁰⁴ acts it seems to cover only such acts as are prohibited by other parts of the decree, we think it should be omitted.

Inasmuch as the association of the defendants is not a corporation, an injunction cannot be issued against it as such, but only against its members, their agents and servants.

As thus modified, in the opinion of the majority of the court, the decree should stand.

Decree accordingly.

HOLMES, C. J. When a question has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however strong his convictions may be, should thereafter accept the law from the majority and leave the remedy to the legislature, if that body sees fit to interfere. If the decision in the present case simply had relied upon *Vegeahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077, I should have hesitated to say anything, although I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the house of lords in *Allen v. Flood*, [1898] App. Cas. 1. But much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one, and to open an issue which otherwise I might have thought closed. The difference between my brethren and me now seems to be a difference of degree, and the line of reasoning followed makes it proper for me to explain where the difference lies.

I agree that the conduct of the defendants is actionable unless justified: *May v. Wood*, 172 Mass. 11, 14, 51 N. E. 191, and cases cited. I agree that the presence or absence of justification may depend upon the object of their conduct, that is,

upon the motive with which they acted: *Vegeahn v. Guntner*, 167 Mass. 92, 105, 106, 57 Am. St. Rep. 443, 44 N. E. 1077. I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal: *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined. A sensible workman would not ⁵⁰⁵ contend that the courts should sanction a combination for the purpose of inflicting or threatening violence or the infraction of admitted rights. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means. The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude, always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing. It is only by divesting our minds of questions of ownership and other machinery of distri-

bution, and by looking solely at the question of consumption—asking ourselves what is the annual product, who consumes it, and what changes would or could we make—that we can keep in the world of realities. But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.

STRIKES AND STRIKERS are discussed in the note to *O'Neill v. Behanna*, 61 Am. St. Rep. 706-711. No one can lawfully interfere by force or intimidation to prevent employers or persons employed, or persons wishing to be employed, from the exercise of the right of employing or seeking or remaining in employment at such rates as may be agreed on: *Vegetahn v. Gunter*, 167 Mass. 92, 57 Am. St. Rep. 443, 44 N. E. 1077. See, too, *Beck v. Railway etc. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13.

STONE v. JENKINS.

[176 Mass. 544, 57 N. E. 1002.]

BANKRUPTCY—RIGHT OF TRUSTEE TO CONTINUE ACTION AFTER HIS DISCHARGE.--If an action is rightfully brought by a trustee in bankruptcy, it may be prosecuted by him or in his name after he is discharged, and the estate closed up for the benefit of the bankrupt and with his consent.

Tort by the trustee of a bankrupt for the conversion of nine horses. Verdict for the plaintiff and the defendant alleged exceptions.

C. F. Eldredge, for the defendant.

J. J. McCarthy, for the plaintiff.

⁵⁴⁴ **MORTON, J.** This is an action of tort by the plaintiff, as trustee in bankruptcy of one Morris, to recover for the conversion of certain horses, in some of which, when he was adjudged bankrupt, Morris had a special property, and of others of which he was the general owner. Before the trial, Morris had made an offer of composition which had been confirmed, and an order had been made discharging the trustee and closing the affairs of the estate. At the trial, the defendant asked certain rulings, ⁵⁴⁵ which were refused. There was a verdict for the plaintiff; and the case is here on the defendant's exceptions

to the rulings that were given and to the refusals to rule as requested.

The only question which has been argued before us is the right of the plaintiff to maintain the action after he was discharged as trustee and the estate was closed up and settled. Other questions raised by the defendant must be deemed to have been waived. It is stated in the defendant's brief that he introduced no evidence, but relied on the ground that the plaintiff no longer could maintain the action in his representative capacity. But for aught that appears in the bill of exceptions the case was fully tried.

When the right of action accrued, Morris had been adjudged bankrupt, and upon the appointment of the plaintiff as trustee the right of action vested in him, and suit was properly brought by him in his own name. When the offer of composition was confirmed and the order made discharging the trustee and closing up the estate, the property in the trustee's hands, including choses in action belonging to the bankrupt estate, vested by force of the statute in Morris: U. S. Stats. 1898, c. 541, sec. 70. We have, therefore, a case in which the right of action was in the trustee when the suit was begun, but has become vested during the pendency of the action in the bankrupt. In such a case it would seem to follow, either that the trustee should be allowed with the consent of the bankrupt to prosecute the action for his benefit, or the bankrupt should be allowed to come in and prosecute it in the name of the trustee on such terms as the court might deem reasonable, or the suit should be amended so that the action should proceed thenceforward in the bankrupt's name. If neither one of these things were done, there would seem to be no good reason why a discontinuance should not be ordered: *Cutts v. Parsons*, 2 Mass. 440. But it would serve no useful purpose to compel the plaintiff to discontinue and to oblige the bankrupt to bring an action in his own name; and such a rule might enable the defendant under some circumstances, though not perhaps in this case, to interpose as a defense the statute of limitations, or some technical matter which he could not otherwise have availed of. In *Mayhew v. Pentecost*, 129 Mass. 332, it was held that an action to recover a debt due before his bankruptcy ⁵⁴⁶ might be brought by the bankrupt after the bankruptcy, with the consent and for the benefit of the assignee in bankruptcy. E converso we do not see why an action duly brought by an assignee or trustee in bankruptcy may not be maintained in his name with his consent by the

bankrupt for his benefit after the cause of action has become vested in him, or may not be so maintained by the assignee or trustee with the consent of the bankrupt: See *Commonwealth v. Phillipsburg*, 10 Mass. 78; *Holten v. Cook*, 12 Mass. 574; *Stone v. Hubbard*, 7 Cush. 595; *Robinson v. Hall*, 11 Gray, 483; *Gerrish v. Gary*, 1 Allen, 213; *Hallett v. Fowler*, 10 Allen, 36; *Herring v. Downing*, 146 Mass. 10, 15 N. E. 116.

There is nothing to show that that is not the situation in the case before us. It is immaterial to the defendant to whom he pays the amount found due, so long as he is not compelled to pay it twice; and if it appears that the action is prosecuted in the name of the plaintiff for the benefit of Morris, either by the plaintiff with his consent or by him with the plaintiff's consent, he will be protected from such liability: *Mayhew v. Pentecost*, 129 Mass. 332. A judgment recovered under such circumstances will be a bar to any other suit for the same cause of action. If the defendant is apprehensive that the status of the case does not sufficiently appear of record, the matter can be rectified by the proper application to the superior court: *Southern Exp. Co. v. Connor*, 12 Nat. Bank. Reg. 53. But no such objection has been urged, and as the case stands we think that the exceptions must be overruled.

So ordered.

BANKRUPTCY.—SUITS BY ASSIGNEES in bankruptcy are discussed in the note to *Winslow v. Fletcher*, 55 Am. Rep. 129-140. For other features of former bankruptcy laws, see the note to *Clark v. Bowling*, 53 Am. Dec. 296-301.

ROCHE v. SMITH.

[176 Mass. 595, 58 N. E. 152.]

BROKER'S RIGHT TO COMMISSIONS FOR AN EXCHANGE OF LANDS PREVENTED BY A DEFECT OF TITLE. If a broker is employed to effect an exchange of lands, and reports an exchange to his employer, which is accepted by the latter, and a written agreement for the exchange entered into between him and the other supposed land owner, but the exchange falls because of a defect in the latter's title, the broker is entitled to his commissions. The remedy of his employer is by an action against the other party to the agreement of exchange to recover for damages for the loss of the bargain.

A. E. Burr, for the plaintiff.

G. R. Blinn, for the defendant.

595 LORING, J. This case was submitted to the superior court on an agreed statement of facts; judgment was entered in that court for the defendant, and from that judgment an appeal was taken to this court.

It appears that the defendant, being the owner of certain land in Boston, "employed the plaintiff to exchange said property for any other suitable property." The plaintiff brought the matter to the attention of Michael F. Armstrong, who offered to exchange a specified piece of land owned by him **596** for the land of the defendant; Armstrong's land was accepted by the defendant as "suitable"; and through the efforts of the plaintiff a written agreement was made between the defendant and Armstrong, by which the defendant was to convey her land to him and he was to convey his land to her; it was stipulated that each lot of land was "to be conveyed within twenty days from this date by a good and sufficient warranty deed . . . conveying a good and clear title to the same free from all encumbrances except [in the case of Armstrong's land] taxes for 1897 and a mortgage for thirteen thousand dollars." On examining Armstrong's title the defendant discovered that, acting under Statutes of 1891, chapter 323, Statutes of 1892, chapter 418, and Statutes of 1895, chapter 449, the board of street commissioners of the city of Boston had filed plans in the office of the city engineer of the city of Boston by which certain streets or ways were located over the land to be conveyed to her by Armstrong, in consequence of which he "was unable to convey his said property free from the operation and effect of any of the said doings of the board of street commissioners, and by reason thereof the defendant refused to carry out said agreements." Thereupon the plaintiff brought this suit for his commission.

It is expressly stated that "the plaintiff had no knowledge of the . . . facts relative to the acts of the board of street commissioners of the city of Boston" which are stated above; and that he "acted in good faith in all said negotiations."

It was held in *Knapp v. Wallace*, 41 N. Y. 477, where the broker was employed to find a person to convey land to be paid for in money, and in *Kalley v. Baker*, 132 N. Y. 1, 28 Am. St. Rep. 542, 29 N. E. 1091, where the broker was employed to find a person to convey land to be paid for by a conveyance of other land, that is to say, to effect an exchange, that, where the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it

turns out that the customer cannot make a good title and the land is not conveyed, provided the broker acted in good faith in the matter. In the opinion of a majority of the court those cases were rightly decided. The question is the same in the two cases; the only difference is that in one case payment is to be made in money, in the other, by a conveyance of other land.

597 Where the broker is employed to get a customer to buy and pay for his principal's land, and it turns out that the customer is not able to pay for the land, it is settled that his inability to do so does not deprive the broker of his commission, provided the principal made a valid and binding agreement for the sale of the land with the customer produced by the broker: *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174; *Burnham v. Upton*, 174 Mass. 408, 409, 54 N. E. 873. The ground on which this is settled is that by entering into a valid contract with the customer produced by the broker the principal accepts the customer as able, ready, and willing to buy the land and pay for it. In such a case the decision would have to be the other way, were it not that, by entering into the contract with him, the principal accepts the customer produced by the broker; what the broker is employed to do is to produce a customer who will buy and pay for his principal's land: *Fitzpatrick v. Gilson*, 176 Mass. 477, 57 N. E. 1000. If it turns out that the customer produced by the broker is not able to pay and does not pay for the land, the broker has not performed his duty and has not earned his commission; and it is only because the principal accepts the customer by entering into a valid contract with him, that it is held in cases like *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174, that the broker has earned his commission: *Coleman v. Meade*, 13 Bush, 358; *Donohue v. Flanagan*, 9 N. Y. Supp. 273, 28 N. Y. St. Rep. 757; *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98; *Springer v. Orr*, 82 Ill. App. 558.

The law is settled in other jurisdictions in accordance with *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587, 20 N. E. 174. See *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192; and generally that a broker makes out a case for a commission earned by proving a contract made: See *Cook v. Fiske*, 12 Gray, 491; *Rice v. Mayo*, 107 Mass. 550; *Keys v. Johnson*, 68 Pa. St. 42;

Veazie v. Parker, 72 Me. 443; Conkling v. Krakauer, 70 Tex. 735, 739, 11 S. W. 117.

The same rule obtains when the principal wants to buy in place of wanting to sell. Where the principal wants to buy one hundred bushels of wheat at a price named by him, and employs a broker to get him the wheat at that price, the broker earns his commission, when he produces a customer and his principal makes a valid, binding agreement with the customer ⁵⁹⁸ for the wheat; and the broker's right to his commission is not affected by the inability or refusal of the customer to deliver the wheat. In such a case the broker has not produced a customer able to supply his principal with the wheat, and would not have earned his commission had it not been that his principal, by contracting with the customer, had accepted him. In such a case the principal has a right to full compensation for the loss of his bargain by recovering damages for breach of the contract, and, in the event which has happened, the commission paid, the broker is paid for that.

The rule is the same when the broker is employed to get for his principal a certain piece of land. If, through the broker's efforts, a binding contract is made between his principal and the owner of the land, the broker has earned his commission, and his right to it is not affected by the fact, if it turns out to be the fact, that the owner, the broker's customer, cannot make a good title. The principal has his remedy by recovering full damages for the loss of his bargain in an action at law on the contract, and, in the event which then happens, it is for that which the commission is paid.

We have no doubt that in this commonwealth a party has a right to recover full damages for the loss of his bargain under a contract for the exchange or purchase of land where it turns out that the party who agreed to convey the land has not a good title: *Old Colony R. R. Co. v. Evans*, 6 Gray, 25, 33, 66 Am. Dec. 394; *Brigham v. Evans*, 113 Mass. 538. The rule which obtains in England and some other jurisdictions never has obtained here.

When a broker employed to procure a person to convey land to his principal, by way of sale or exchange, in good faith produces a customer as a person ready, able, and willing to do so, the principal has three courses of action open to him: 1. He may examine the title of the customer, and accept him or not accept him on learning the result of the examination; 2. He may enter into a contract with him, in which it is provided

that his title shall be examined, and if it turns out that his title is not good the contract is at an end; or 3. He may enter into a binding contract with him for the conveyance of the land. In case he takes the third course of action he is given full compensation in damages for the loss of his bargain, if the ⁵⁹⁹ customer fails to fulfill his contract by conveying the land. Since the principal gets full compensation for the loss of his bargain in that event, there is no escape from holding that the broker has earned his commission when his efforts have resulted in the making of a valid contract. It does not lie in the mouth of a principal to say that the broker's commission has not been earned, when he has secured through the broker's efforts the land he wished, or full compensation for the loss of it. He cannot retain the right to this compensation and not pay for the broker's services in obtaining it for him.

When the broker knows that the customer produced by him has not a title, and omits to tell his principal of that fact, he has not acted in good faith, and has not earned his commission: *Burnham v. Upton*, 174 Mass. 408, 54 N. E. 873; *Butler v. Baker*, 17 R. I. 582, 33 Am. St. Rep. 897, 23 Atl. 1019.

It is stipulated in the agreed facts that if the plaintiff is entitled to recover, the amount to which he is entitled is eight hundred dollars. The entry must be judgment for the plaintiff for eight hundred dollars, with interest from the date of the writ.

BROKER'S COMMISSION.—FAILURE OF TITLE does not deprive a real estate broker of his right to commissions: See the note to *Kalley v. Baker*, 28 Am. St. Rep. 547, 548; *Barthell v. Peter*, 88 Wis. 316, 43 Am. St. Rep. 906, 60 N. W. 429.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**HAMILTON v. MINNEAPOLIS DESK MANUFACTURING
COMPANY.**

[78 Minn. 3, 80 N. W. 693.]

REAL PROPERTY—DUTY AS TO SAFE CONDITION OF BUILDINGS FOR FIREMEN.—The owner or occupant of a building owes no duty at common law to keep it in a reasonably safe condition for members of a public fire department who may, in the exercise of their duties, have occasion to enter the building.

STATUTES—EXPRESSION OF SUBJECT IN TITLE.—**FIREMEN** are not included in the title of “an act providing for the protection of employés.” The act, as thus limited, under a constitution requiring the subject of the act to be expressed in its title, is one exclusively for the protection of employés.

NEGLIGENCE—OMISSION OF DUTY DUE TO ANOTHER CLASS OF PERSONS.—In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute for the benefit of somebody else, and that such person would not have been injured if the duty had been performed, but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection.

Action for personal injuries.

Charles A. Dalby, for the appellant.

George W. Meyer, for the respondent.

⁵ **BUCK, J.** The plaintiff was a fireman in the employ of the fire department of the city of Minneapolis, and sustained an injury by reason of his falling through an unguarded elevator shaft in a factory in the possession and control of the defendant, not owned by it, but wherein it carried on the business

of manufacturing desks, and to this end operated the elevator in question. The plaintiff entered the building in the discharge of his duty, as a member of said fire department, in response to a call to extinguish a fire originating in said building, and it was while in the discharge of such duty that he was so injured, through the negligence of the defendant in failing and omitting to fence and place guards around or inclose said elevator. The facts were alleged in the complaint, and defendant demurred, on the ground that sufficient facts were not stated to constitute a cause of action, and, this demurrer being overruled, the defendant appeals.

By the rules of the common law, a fireman going upon the premises of another, under the circumstances appearing in this record, could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building. Hence, if plaintiff has any right of action, it must be by virtue of the Laws of 1893, chapter 7.

The body of the act may be broad enough to bring him within its provisions. It is undoubtedly the law that, in the absence of provisions requiring the subject of the act to be expressed in its title, ⁶ the provisions of a statute may carry the act beyond its preamble or title. But, as our constitution requires the subject of the act to be expressed in the title, all provisions of the act not germane to the title (like the act under consideration, viz., "An act providing for the protection of employés"), are invalid, and are just the same as if they had never been incorporated in the act. Thus limited, the act becomes one exclusively for the protection of employés and firemen would not come within its provisions. In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute for the benefit of somebody else, and that such person would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection: *Rosse v. St. Paul etc. Ry. Co.*, 68 Minn. 216, 64 Am. St. Rep. 472, 71 N. W. 20.

The plaintiff not having brought himself within the class intended by the statute to be protected and benefited, cannot rely on its violation as grounds for recovery, however meritorious a case he may seemingly have. The question is one worthy of

serious legislative consideration, but the court cannot grant relief, for in law there is none.

Order reversed.

REAL PROPERTY—LICENSEE—FIREMAN.—A member of the fire department of a city, injured by falling into an unguarded elevator well in a building, while extinguishing a fire therein, cannot recover of the owner, without showing that he has violated some statute, or proving facts which amount to an invitation to enter therein: *Beehler v. Daniels*, 18 R. I. 563, 49 Am. St. Rep. 790, 29 Atl. 6.

NEGLIGENCE.—TO JUSTIFY A RECOVERY for alleged negligence, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute. He must be shown to have neglected a duty or obligation which he owed to him who claims damages for the neglect: *Williams v. Chicago etc. R. R.*, 135 Ill. 491, 25 Am. St. Rep. 397, 26 N. E. 661.

GULICKSON v. BODKIN.

[78 Minn. 33, 80 N. W. 783.]

JUDGMENT—COLLATERAL ATTACK FOR WANT OF JURISDICTION—PRESUMPTION.—When a domestic judgment is collaterally attacked for want of jurisdiction, the jurisdiction is to be conclusively presumed, unless the contrary affirmatively appears on the face of the record itself; and this presumption obtains when the record is silent upon the jurisdictional fact as well as where it affirmatively states or recites it.

JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION DOES NOT AFFIRMATIVELY APPEAR, WHEN.—The mere absence from the judgment-roll of certain papers which ought to have been made a part of it, and which, if included, would affirmatively show that jurisdiction had been acquired, is not enough to make it "affirmatively appear from the face of the record that the court had no jurisdiction."

Action against a sheriff. There was a judgment for the defendant, and the plaintiff appealed.

C. A. Nye, for the appellant.

F. H. Peterson, for the respondent.

34 MITCHELL, J. This was an action of claim and delivery. It is admitted that the plaintiff, who derived his title from one Olson, was the general owner of the property, and entitled to the possession, unless the defendant, as sheriff, had a prior special property by virtue of a levy under an execution issued out of the district court upon a judgment in favor of one Palacek and against Olson. The regularity of the execution

on its face, and the fact that the levy on the property antedated its sale by Olson to plaintiff, are not questioned.

The contention of the plaintiff is that the judgment of the district court upon which the execution was issued was absolutely void because of the want of jurisdiction of the court to render it. The action of Palacek against Olson was originally brought in justice's court, and was appealed, or attempted to be appealed, by the defendant, to the district court. Olson failed to appear, or enter the appeal on the calendar for trial, as required by statute; whereupon the plaintiff, Palacek, entered it, and upon his motion the court ordered judgment against the appellant, Olson, for the amount of the judgment of the justice, and costs of both courts, as provided by the General Statutes of 1894, section 5072.

The sole point urged by the defendant here is that the district court had no jurisdiction to enter any such judgment, because there had never been any valid appeal of the action to that court. The only evidence introduced or offered by the defendant to sustain this contention was the "judgment-roll" in the district court in the action of Palacek against Olson, in connection with a stipulation of the parties that the records in this case "were the identical ³⁵ records upon which this execution was issued." This "judgment-roll" consisted of copies of the notice of appeal to the district court, certain docket entries of the justice (which are silent on the subject of appeal), notice of taxation of costs, and the judgment. Both the order for judgment and the judgment recited that the defendant Olson had appealed to the district court. This was all the evidence introduced or offered bearing on the question of the validity of the judgment.

Plaintiff's line of argument is that, because this judgment-roll does not contain the papers necessary to constitute an effectual appeal to the district court—particularly an affidavit on appeal—therefore it appears affirmatively that there was no appeal; hence, on the face of the record, the judgment is absolutely void. Conceding, without deciding, that, if it affirmatively appeared on the face of the record that there never was any sufficient appeal, the judgment would be absolutely void, even as against a collateral attack, still no such fact affirmatively appears from the judgment-roll introduced in evidence. It has been repeatedly held by this court that, when the validity of a domestic judgment is sought to be attacked collaterally on the ground of want of jurisdiction, the jurisdiction is to be

conclusively presumed, unless the contrary affirmatively appears on the face of the record itself; that this presumption obtains when the record is silent upon the jurisdictional fact, as well as where it affirmatively states or recites it. The want of jurisdiction does not affirmatively appear on the face of the record in this case. The mere absence from the judgment-roll of certain papers which ought to have been made a part of it, and which, if included, would affirmatively show that jurisdiction had been acquired, is not enough to make it "affirmatively appear from the face of the record that the court had no jurisdiction." In aid of his case, counsel for the plaintiff relies upon and invokes the stipulation, already referred to, to the effect that these were the records upon which the execution was issued. We discover nothing in this that at all affects the case.

Judgment affirmed.

JUDGMENT — COLLATERAL ATTACK — JURISDICTION — NONAPPEARANCE OF ORIGINAL PAPERS IN JUDGMENT-ROLL.—In a collateral attack upon a domestic judgment of a court of general jurisdiction every presumption will be indulged in favor of the validity of the judgment: Note to *Rogers v. Miller*, 52 Am. St. Rep. 24. If the court which rendered it is a court of the state in which the judgment is offered in evidence, the presumption of jurisdiction is, in most states, indisputable in a collateral action: See the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 114; and if the proof of publication of summons, as well as the findings, and recitals in the judgment, show that a summons was issued, the judgment will not be held void, upon collateral attack, because the original summons does not appear in the judgment-roll: *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359.

WANEK v. WINONA.

[78 Minn. 98, 80 N. W. 751.]

TRIAL—PHYSICAL EXAMINATION—POWER OF COURT TO REQUIRE PARTY TO SUBMIT TO.—In a civil action for personal injuries, where the plaintiff tenders an issue as to his physical condition and appeals for redress, the court has power, upon proper safeguards to protect the rights of both parties, to order the plaintiff to submit to a physical examination of his person, that the nature and extent of his injuries may be ascertained, and to dismiss his action in case he refuses to submit. It is error for the trial court, in a proper case, to deny the defendant's application, reasonably made, for such an order.

Action for personal injuries. There was a verdict for the plaintiff and the defendant appealed.

W. A. Finkelnburg and O. B. Gould, for the appellant.

H. M. Lamberton and Brown & Abbott, for the respondent.

99 MITCHELL, J. This action was brought to recover damages for personal injuries caused by the alleged negligence of the city in allowing a public sidewalk to become and remain out of repair, and in an unsafe condition for public travel.

The only question which we find it necessary to consider is whether the trial court erred in denying the application of the defendant to require the plaintiff to submit himself to a physical examination by two or more competent and disinterested physicians, to be named by the court, in order to ascertain the nature and extent of his injuries. The alleged injuries were sustained October 19, 1898. The plaintiff's notice of his claim for damages was served on the city November 14, 1898. This action was commenced December 9th of the same year, and defendant's application for a physical examination was made May 1, 1899, the first day of the term at which the action was tried. The complaint alleged that the injuries would be permanent, and the existence or nonexistence of at least some of the injuries could only be ascertained by a physical examination of plaintiff's person. The trial court denied the application upon the grounds, as shown by his memorandum: 1. That he had no power in any case to order a party to submit to a physical examination **100** of his person; and 2. Even if he had the power, he would, in the exercise of his discretion, have refused, under the circumstances of the case, to grant defendant's application.

1. We are very clearly of the opinion that the court has the power, in a case of this kind, to order the plaintiff to submit to a physical examination of his person. We shall not go into any extended discussion of a question which has been so much and so often discussed by courts and text-writers. Upon both principle and reason we are of opinion that in a civil action for physical injuries, where the plaintiff tenders an issue as to his physical condition, and appeals to the courts of justice for redress, it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application reasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so.

We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the state for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination. But he must either submit to it, or have his action dismissed.

Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such ¹⁰¹ actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called "medical experts." To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment.

2. The next question is whether there was an abuse of discretion in denying plaintiff's request. The opinion of the learned court that he would have denied it even if he had the power to grant it, may quite naturally have been somewhat influenced by the fact that he was apparently very decided in his own view that the law was and ought to be that courts have no such power. The only reason suggested in his memorandum why he would have denied the application in the exercise of his discretion is that the defendant had already had an opportunity

for the examination of the person of the plaintiff. The facts, as disclosed by the affidavits interposed by the plaintiff in opposition to the application, were substantially as follows: A day or two after the accident, the plaintiff's wife, at her husband's request, called on one of the city aldermen, and requested him to send the city physician to see and treat the plaintiff at the city's expense. The alderman, having ascertained that the city physician was absent from the city, requested Dr. Keyes to do so in his place. Dr. Keyes did so, and attended and treated the plaintiff for some time, and during such treatment examined his person two or three times. The last of these examinations was on October 31st, which was before this action was commenced, and before plaintiff had even served on the city notice of his claim for damages, and consequently before the city officials knew, or had the means of knowing, what injuries he would claim to have received. Plaintiff, ¹⁰² having become dissatisfied with Dr. Keyes' treatment, discharged him, and employed another physician, since deceased. Subsequently—the exact date does not appear, but presumably after plaintiff had served notice of his claim against the city—the city attorney, accompanied by Dr. Keyes, came to plaintiff's house, and demanded that he submit to another examination, which he declined to do.

The above is the only opportunity the defendant has ever had of examining the plaintiff's person. The injuries alleged in the complaint are numerous, severe, and permanent, consisting of injuries to his leg, back, right side, right groin, testicles, bladder, and nervous system. Assuming that the examinations by Dr. Keyes in the course of his treatment of the plaintiff are to be considered as made at the request and in behalf of the city, still, being made before it knew what injuries he would claim in his complaint, they could not have been specifically directed to ascertain whether those particular injuries had or had not been sustained. Again, in any view of the case, the developments during the intervening six months would be most valuable, if not essential, in ascertaining the severity of the injuries, and whether they were permanent. For these reasons, we are of opinion that the trial court erred in not granting defendant's application.

We discover no other error in the record, but for this one the order appealed from must be reversed, and a new trial granted. It is so ordered.

TRIAL—POWER TO ORDER EXAMINATION OF THE PLAINTIFF'S PERSON.—In a civil action to recover damages for an injury to the person, the court has power, on application of the defendant, to order that the plaintiff be examined by medical experts, appointed by the court, for the purpose of ascertaining the nature, character, and extent of the plaintiff's injuries, and may enforce such order by staying the trial or dismissing the case: *Lane v. Spokane etc. Ry. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, and note.

STATE v. LOWELL.

[78 Minn. 166, 80 N. W. 877.]

MARRIAGE UNDER AGE OF COMPETENCY—VALIDITY OF.—The marriage of a person who has not reached the age of competency, as established by the statute, but who is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterward, if the parties have not voluntarily cohabited as husband and wife, after reaching the age of consent.

MARRIAGE—EFFECT OF, WHEN VOIDABLE.—A voidable marriage must be treated as valid, for all civil purposes, until it is annulled by a judicial decree.

MARRIAGE OF MINOR—EMANCIPATION.—The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent. Hence, the father of a married girl, nearly fourteen years of age, has no right to detain her, if she elects to live with her husband.

Charles G. Laybourn, for the relator.

J. N. Bearnese, for the respondent.

¹⁶⁶ **START, C. J.** On October 18, 1899, the relator, Alexander W. Scott, a man thirty-two years of age, and Sadie Lowell, a girl then only thirteen years and eleven months old, the daughter of the respondent Fred L. Lowell, were married, without the consent of her parents, in due form, by an ordained minister of the gospel, upon the presentation of a license ¹⁶⁷ in due form, issued by the clerk of the proper county. Cohabitation as husband and wife followed the marriage, but on the next day thereafter the father went to the house of the husband, and forcibly took his daughter away, against her will and wishes, and detained her. Thereupon a writ of habeas corpus in her behalf was sued out of the district court for the county of Hennepin, on the relation of her husband. Upon a hearing on the return of the writ the court discharged the writ, and remanded the wife to the custody and control of her father,

from which order the relator appealed to this court. The cause was here heard *de novo*, pursuant to the Laws of 1895, chapter 327. A referee was appointed to take and report the evidence, who did so.

The evidence establishes the facts we have already stated, and further, that the husband is an industrious man, who has a home and is able to support a wife and family, and that his wife is ready and anxious to return to and live with him as her husband, if relieved from the restraint of her father. The wisdom of this marriage, or the propriety of the relator's conduct in inducing this young girl to marry him, are questions which it is not our province to discuss or characterize. Moralize as we may, the fact remains that the parties were married, and the marriage has been consummated; hence we are now simply to inquire dispassionately as to the legal status of the parties. The question presented by the record is, Was this marriage void or voidable, and, if the latter, did it emancipate the wife from the custody of her father?

The common law established the age of consent to the marriage contract at fourteen years for males and twelve years for females, but our statute (Gen. Stats. 1894, sec. 4769) provides that: "Every male person who has attained the full age of eighteen years, and every female who has attained the full age of fifteen years, is capable in law of contracting marriage, if otherwise competent."

But the statute does not declare that, if a marriage is entered into when one or both of the parties are under the age limit prescribed, the marriage shall be void. It does, however, impose restrictions and penalties upon public officers and clergymen, for the purpose of preventing, so far as possible, such marriages being solemnized; but ¹⁶⁸ the statute has, for wise reasons, stopped short of declaring such marriages void. Such being the case, we hold, upon principle and authority, that the marriage of a person who has not reached the age of competency as established by the statute, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterward if the parties have not voluntarily cohabited as husband and wife after reaching the age of consent: Gen. Stats. 1894, secs. 4769, 4786, 4788, 4789; Schouler on Domestic Relations, sec. 20; 14 Am. & Eng. Ency. of Law, 488; 1 Bishop on Marriage and Divorce, sec. 145; *Beggs v. State*, 55 Ala. 108;

Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806; State v. Cone, 86 Wis. 498, 57 N. W. 50. The marriage being voidable, it must be treated as valid for all civil purposes until annulled by judicial decree: Schouler on Domestic Relations, sec. 14.

Now, the question of the right of the respondent, as father of the relator's wife, to restrain her from going to her husband, must be determined upon the basis that the marriage is valid. The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child: 1 Bishop on Marriage and Divorce, sec. 275; Schouler on Domestic Relations, sec. 267. The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband cannot enforce his marital rights without the consent of the wife, and that she cannot, by giving her consent to a voidable marriage, free herself from parental control, and, further, that she cannot do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under twelve and over seven years of age to emancipate herself by consenting to a voidable marriage. This course of reasoning ignores the fact that the marriage, until set aside, must be, for all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife—and this girl must be regarded as such for the ¹⁶⁹ purposes of this case—certainly has the capacity to consent to live with her husband.

Whether the marriage of a child under twelve years of age and over seven years would emancipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control. Our conclusion is that the respondent is not legally entitled to detain his daughter, if she elects to return and live with her husband.

Therefore, it is ordered that Sadie Scott, the wife of the relator, Alexander W. Scott, be freed from the restraint of her father, the respondent Fred L. Lowell, and that he surrender her to the relator, if she elects to live with him as her husband. Let judgment be so entered.

THE MARRIAGE OF AN INFANT DAUGHTER EMANCIPATES HER from the control of her parents: See cases cited in *Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706; and compare *Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515.

What Marriages are Void.*

Common-law Marriages—Validity of, Generally.—Whatever may be the rule governing other contracts, the contract of marriage is a contract jure gentium, and consent and the assumption of the marriage status are all that is required by natural or public law to constitute a valid common-law marriage: *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; note to *Renfrow v. Renfrow*, 72 Am. St. Rep. 350, 353; *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31. To complete a marriage nothing more is necessary than a full, free, and mutual consent between parties not incapable of contracting: *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563. Restrictions upon marriage or remarriage are exceptional: *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81; *Laurence v. Laurence*, 164 Ill. 367, 371, 45 N. E. 1071. The council of Trent declared null and void every marriage not celebrated before a priest, or by license of the ordinary, and before two or three witnesses. But an ecclesiastical decree could not, proprio vigore, affect the status or civil relations of persons, and while this decree was received in Spain and promulgated by Philip II in his European dominions, it was not extended to the Spanish colonies in this country, wherein all that was necessary to constitute a valid marriage was that there should be consent joined with the will to marry, and this rule, established by the Partidas, was permitted to remain unchanged: *Hallett v. Collins*, 10 How. 174, 181. In this country, marriage is a matter of state regulation, and the national power has no legislative or judicial cognizance of the subject within state boundaries: *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42. The power of the legislature over the subject of marriage, as a civil contract, is unlimited and supreme, except as modified by provisions of the state constitution: *State v. Duket*, 90 Wis. 272, 48 Am. St. Rep. 923, 63 N. W. 83.

A marriage is not void because the formalities prescribed by statute, concerning the procurement of a license and solemnization, have not been observed: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325; *State v. Zichfeld*, 23 Nev. 304, 309, 62 Am. St. Rep. 800, 802, 46 Pac. 802; *Farley v. Farley*, 94 Ala. 501,

***REFERENCES TO MONOGRAPHIC NOTES.**

Physical incapacity as a ground for annulling marriage: 28 Am. Dec. 447-451.

What marriages are void and what are voidable: 44 Am. Dec. 54-57.

Effect of marriage during the continuance of a prior valid marriage: 46 Am. Dec. 130-134.

Validity of marriages contracted by residents of a state or country in violation of its laws, but beyond its boundaries: 60 Am. St. Rep. 941-947.

33 Am. St. Rep. 141, 10 South. 646; *Simon v. State*, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399; *Ingersol v. McWillie*, 9 Tex. Civ. App. 543, 555; *State v. Parker*, 106 N. C. 711, 11 S. E. 517; *Sharon v. Sharon*, 75 Cal. 1, 13, 16 Pac. 345; *State v. Robbins*, 6 Ired. 23, 44 Am. Dec. 64; *Blackburn v. Crawfords*, 3 Wall. 175; *White v. State*, 4 Iowa, 449; *Connors v. Connors*, 5 Wyo. 433, 40 Pac. 966. Thus, a marriage without a license and solemnized by an unauthorized person is valid, if the parties consent thereto and afterward cohabit together: *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 South. 646; *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209; and a marriage is not void because it is solemnized without a license, even where solemnization without it is forbidden: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115. A marriage ceremony performed by an officer outside of his jurisdiction is not, for that reason, void: *Simon v. State*, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399. Neither is a marriage void because the license was obtained from an improper county: *Gatewood v. Trunk*, 3 Bibb, 246.

One purpose of statutes concerning marriage is to compel publicity, but those requiring the procurement of a license and laws concerning solemnization are generally regarded as directory merely upon ministers and magistrates, to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled: *Meister v. Moore*, 96 U. S. 76, 80; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802. Such statutes are held to be directory, "because marriage is a thing of common right, because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law": *Meister v. Moore*, 96 U. S. 76, 81, per Mr. Justice Strong. The weight of authority, therefore, supports the proposition that a marriage good at common law is good notwithstanding the neglect of statutory forms relating to the subject, although a penalty is imposed for their violation, unless the statute itself contains express words avoiding the marriage because of a failure to conform to such statutory requirements: *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534; *Meister v. Moore*, 96 U. S. 76; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Hargroves v. Thompson*, 31 Miss. 211; *Beggs v. State*, 55 Ala. 108, 113; *Parton v. Hervey*, 1 Gray, 119, 122; *Campbell v. Gullatt*, 43 Ala. 57, 68; *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Mason v. Mason*, 101 Ind. 25; *Wiley v. Wiley*, 22 Wash. 115, post, p. 923, 60 Pac. 145, overruling *In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059; *Askew v. Dupree*, 30 Ga. 173, 180, 186, 188; *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325; *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*,

98 Ill. 126; *Simon v. State*, 31 Tex. Cr. Rep. 186, 37 Am. St. Rep. 802, 20 S. W. 399; *Haggin v. Haggin*, 35 Neb. 375, 380, 53 N. W. 209; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802.

Thus, it is held that a statute prescribing the procurement of a marriage license, and the other formalities to be observed in the solemnization of marriage, does not render marriages entered into according to the common law, but not in conformity with such formalities, void, unless the statute itself declares them so: *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325. The legislature has full power to prescribe reasonable regulations as to marriage, and to prescribe penalties against those who solemnize or contract marriage contrary to statutory command, and punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void: *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279; but even marriages prohibited by law are not absolutely void unless so declared to be, because the law, for reasons of public policy, is more tender of nuptial contracts than ordinary contracts which relate merely to property and the ordinary dealings among men: *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Willey v. Willey*, 22 Wash. 115, post, p. 923, 60 Pac. 145; *Parton v. Hervey*, 1 Gray, 119, 122; *Mason v. Mason*, 101 Ind. 25; *Hargroves v. Thompson*, 31 Miss. 211, 215. The punishments and penalties imposed by marriage laws are not inflicted, as a general rule, upon the married parties themselves, but upon persons charged with certain duties by such laws, for omitting, neglecting, or performing such duties improperly. And, while we have not examined all of the statutes upon the subject, it is believed that, in a majority of the states, the marital relation has not been abrogated as the penalty for a marriage not celebrated in conformity with the statute. At any rate, the statutes of Alabama, Georgia, Illinois, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nevada, and Washington contain no words of nullity, in such cases, as shown by the following decisions, respectively: *Campbell v. Gullatt*, 43 Ala. 57, 68; *Askew v. Dupree*, 30 Ga. 173, 188; *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534; *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Meister v. Moore*, 96 U. S. 76, 81, discussing the statute of Michigan; *Hargroves v. Thompson*, 31 Miss. 211, 215; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869; *State v. Zichfeld*, 23 Nev. 304, 308, 62 Am. St. Rep. 800, 801, 46 Pac. 802; *Willey v. Willey*, 22 Wash. 115, post, p. 923, 60 Pac. 145. And the general rule is not, it seems, confined to mere matters of formality, and the marriage of persons who are prohibited by statute from marrying is not void, unless it is so declared by the statute; at least, this appears to be supported by authority except, perhaps, in

case of the marriage of insane persons, or those who contract bigamous or incestuous marriages: See *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Willey v. Willey*, 22 Wash. 113, post, p. 923, 60 Pac. 145; and compare the subdivisions, "Marriage of Infants," and "Marriage After Divorce," infra; contra, *In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059; *In re Wilbur's Estate*, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407, holding that a marriage prohibited by statute is invalid. Ordinary contracts prohibited by penal statute are illegal and invalid, but marriage is an exception: *Hervey v. Moseley*, 7 Gray. 479, 66 Am. Dec. 515.

In some of the states, however, common-law marriages are not valid: *Morrill v. Palmer*, 68 Vt. 1, 7, 37 Atl. 269; *In re McLaughlin's Estate*, 4 Wash. 570, 589, 30 Pac. 651; *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554; and in *Millford v. Worcester*, 7 Mass. 48, it was held that a marriage by mutual agreement, not according to the statute, was void, but this opinion, evidently a departure from the general doctrine, and distasteful to the public sentiment, was overruled in the subsequent case of *Parton v. Hervey*, 1 Gray, 119, 122, holding that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute, where there is no statutory provisions, declaring marriages, not celebrated in a prescribed manner, or between parties of certain ages, absolutely void. So, common-law marriages, when contracted in the state of West Virginia, are not recognized by the courts of that state as valid. No marriage contracted in that state is valid when it affirmatively appears that it has not been solemnized according to the statute: *Beverlin v. Beverlin*, 29 W. Va. 732, 739, 3 S. E. 36; and in Kentucky, marriages not solemnized or contracted in the presence of an authorized person or society are void: *Estill v. Rogers*, 1 Bush, 62.

Law of the Lex Loci Contractus.—The validity of a marriage is governed by the lex loci: *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; and it is a general rule that a marriage, valid in the state where it was contracted, will elsewhere be recognized as valid: *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81; *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. Dec. 206; *Fornshill v. Murray*, 1 Bland, 479, 18 Am. Dec. 344; *State v. Patterson*, 2 Ired. 346, 38 Am. Dec. 699; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158. Thus, a second marriage consummated in Mississippi is binding in Louisiana, although the first marriage was void by the law of Mississippi, the husband having at that time a wife living, but from whom, before the second marriage, he had been divorced: *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. Dec. 206. And state courts will recognize as valid all marriages of a foreign country if made in pursuance of the forms and usages of that country: *Morgan v. McGhee*, 5 Humph. 13; but a Chinese marriage,

to be valid here, must have been solemnized within the jurisdiction of Chinese laws. A marriage between a Chinaman while in this country and his betrothed in China can hardly be regarded as a valid China marriage: *In re Lum Lin Ying*, 59 Fed. 682. A marriage on the high seas must be judged by the law of the state of the domicile of the parties, and if not supported thereby is void. There is no law in force on the high seas, unless it is that of the domicile of the parties, controlling or authorizing marriage: *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74, 54 Pac. 143; and see monographic note to *State v. Shattuck*, 60 Am. St. Rep. 947. The converse of the general rule is also equally general, namely, that a marriage void where it is celebrated is void everywhere: *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164.

The general rule that the validity of marriage contracts is determined by the *lex loci contractus* has, however, some well-recognized exceptions, involving polygamy, incest, and probably some other equally heinous crimes against the generally recognized law of marriage, and express prohibitory and invalidating words in a statute. More precisely, there are two exceptions: 1. Marriages which are deemed contrary to the law of nature as generally recognized in Christian countries; 2. Marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication. Hence, a marriage, though valid by the law of the *lex loci*, will not be recognized when it is opposed to the religion, morality, or municipal institutions of the state or country in which it is sought to be upheld: *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *In re Wilbur's Estate*, 8 Wash. 35, 37, 40 Am. St. Rep. 886, 888, 35 Pac. 407; *Smith v. Smith*, 52 N. J. L. 207, 213, 19 Atl. 255; *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. 305; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; note to *State v. Shattuck*, 60 Am. St. Rep. 944; *Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706; *Jackson v. Jackson*, 82 Md. 17, 29, 33 Atl. 317. Thus, if a state should allow the marriage of imbeciles, it would not be allowed to have validity elsewhere: *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; and the principle of comity would not be extended to legalize incestuous marriages: *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131.

To determine when a marriage, prohibited in terms by the statute, is valid, presents a question full of difficulties, which are not easy of solution, where the parties have gone outside of the state to evade its laws in contracting marriage; and these difficulties have led to conflicting decisions. Thus, it has been held that persons domiciled in one state, where marriage between them is absolutely prohibited, cannot evade its laws and policy by going into another state, and there marrying, and then returning to the home state to reside; and that such a marriage is void in the latter state:

Estate of Stull, 183 Pa. St. 625, 63 Am. St. Rep. 776, 39 Atl. 16; McLennan v. McLennan, 31 Or. 480, 65 Am. St. Rep. 835, 50 Pac. 802; Williams v. Oates, 5 Ired. 535; Pennegar v. State, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. 305; Estate of Wilbur, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407; State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683, and other cases cited in the monographic note to State v. Shattuck. 60 Am. St. Rep. 945, 946, discussing the validity of marriages contracted by residents of a state or country in violation of its laws, but beyond its boundaries. "Where a marriage," says Stiles, J., in *In re Wilbur's Estate*, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407, "is prohibited, either by the statute or by those rules of morality and decency which make it against the natural law of civilized nations for two persons to marry, as incestuous or polygamous marriages, it is in vain for them to go beyond their domicile, to engage in a contract of marriage, for the purpose of avoiding the prohibition. Their contract will be held void upon their return." If a man and a woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals, leave their domicile and enter another state where marriage between them is not prohibited, and there marry for the express purpose of evading the laws of their domicile, such marriage is held to be void in the state having the prohibition: Estate of Stull, 183 Pa. St. 625, 63 Am. St. Rep. 776, 39 Atl. 16. So, if the statutes of a state declare that a decree annulling or dissolving a marriage shall terminate it as to both parties, except that neither shall be capable of contracting marriage with a third person until the suit has been heard on appeal, or the time for such appeal has expired, a marriage between a party to such decree and a third person resident of the state, contracted in another state, to which they went for the purpose of solemnizing their marriage, is considered void in the state of their domicile: McLennan v. McLennan, 31 Or. 480, 65 Am. St. Rep. 835, 50 Pac. 802. If, under a statute providing that a wife or husband who shall have been guilty of adultery shall not marry the person with whom it was committed during the life of the former husband or wife, a husband, after being divorced from his wife, in the state where such statute is in force, on the ground of adultery with a woman domiciled therein, goes into another state and marries his paramour, such marriage being there valid, and they immediately return to their former domicile, the second marriage is void in the state having the prohibition: Estate of Stull, 183 Pa. St. 625, 63 Am. St. Rep. 776, 39 Atl. 16; and if a woman obtains a partial divorce, and goes out of the state to evade its laws, gets married and returns, she is only a concubine in the home state: *Carmena v. Blaney*, 16 La. Ann. 245.

On the other hand, there is much good authority for saying that a marriage contracted out of this state, if valid where contracted, is valid here, although the parties intended to avoid our laws, unless

the statutes declare such marriage void, or it is deemed contrary to the law of nature as generally recognized in Christian countries: *Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131; *Putnam v. Putnam*, 8 Pick. 433; *Commonwealth v. Lane*, 113 Mass. 458, 464, 18 Am. Rep. 509, 514; *Stevenson v. Gray*, 17 B. Mon. 193; *Commonwealth v. Hunt*, 4 Cush. 49, 50; *Sutton v. Warren*, 10 Met. 451, 452; *State v. Shattuck*, 69 Vt. 403. 60 Am. St. Rep. 936, 38 Atl. 81. To the same effect see, also, *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189, epitomized in the note to *State v. Shattuck*, 60 Am. St. Rep. 944. "It is a well-settled principle in our law," said Hubbard, J., in *Sutton v. Warren*, 10 Met. 451, 452, "that marriages celebrated in other states or countries. if valid by the law of the country where they are celebrated, are of binding obligation within this commonwealth, although the same might, by force of our laws, be held invalid if contracted here. This principle has been adopted, as best calculated to protect the highest welfare of the community in the preservation of the purity and happiness of the most important domestic relation in life." They are upheld on grounds of public policy: *Commonwealth v. Hunt*, 4 Cush. 45, 50. Even where the statute provides that when persons resident in this state, in order to evade its marriage laws, and with an intention of returning to reside in this state, go into another state or country, and there have their marriage solemnized, and afterward return and reside here, the marriage shall be deemed void in this state, it cannot be so deemed without proof that the parties went outside of this state to avoid its laws: *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509. In North Carolina, where a marriage between a negro and a white person is prohibited, it has been held that, if the parties leave the state for the purpose of avoiding the law, without intending to return, and are married in another state, where such marriages are lawful, and return to North Carolina, the marriage is valid in the latter state: *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; but that if they go out of the state for such purpose, with intent to return, and do return, their marriage, though lawful in the state where contracted, is not valid in North Carolina: *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683.

In divorce cases it has been held that parties who are under no disability by international law may choose their place of marriage, and if the marriage is valid there, it is valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have constituted a valid marriage; and that one divorced in one state and forbidden by the statute of that state to remarry may remarry in another state whose laws contain no such restriction, and such remarriage must be recognized as valid in the state where the divorce was obtained, al-

though both parties to the remarriage were residents of and domiciled in the latter state both before and immediately after such marriage was solemnized: *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81. If a statute, silent as to marriage outside the state, prohibits classes of persons from marrying generally or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state; and if such marriages are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of the state whose statute contains such restrictions: *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81. It has lately been held in Washington that if one of the parties to a divorce proceeding in that state, whose laws prohibited the remarriage of either party within six months after the rendition of a decree of divorce, contracts a valid marriage in another state, such marriage is valid in Washington, although the parties return to that state and take up their residence there before the prohibited period has expired: *Willey v. Willey*, 22 Wash. 115, post, p. 923, 60 Pac. 145; overruling *In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059. The statute of Massachusetts declares that when residents of that state, for the purpose of evading its laws as to prohibited marriages, and with an intention of returning to reside in that state, go into another state or country, and there have a marriage between them solemnized, and they afterward return to and reside in Massachusetts, the marriage is void in the latter state: *Tyler v. Tyler*, 170 Mass. 150, 48 N. E. 1075; but the rigor of such a statute is much mollified by a holding that both parties must have the intention of evading the statute before the marriage will be declared void: *Whippen v. Whippen*, 171 Mass. 560, 51 N. E. 174.

Marriage After Divorce.—It appears to be firmly established that a statute of a state, prohibiting a guilty defendant in a divorce suit from remarrying, has no extraterritorial force, and cannot prevent him from lawfully remarrying in some other state, although it may subject him to punishment in the former state: *Frame v. Thormann*, 102 Wis. 654, 672, 79 N. W. 39; *Dickson v. Dickson*, 1 Yerg. 110, 24 Am. Dec. 444; *Fuller v. Fuller*, 40 Ala. 301, 306; *Van Storch v. Griffin*, 71 Pa. St. 240; *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768, 3 South. 321; *Succession of Hernandez*, 46 La. Ann. 962, 994, 15 South. 461; *Reed v. Hudson*, 13 Ala. 570; *State v. Shattuck*; 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81; *Clark v. Clark*, 8 Cush. 385; *Crawford v. State*, 73 Miss. 172, 18 South. 848; *Phillips v. Madrid*, 83 Me. 205, 23 Am. St. Rep. 770, 22 Atl. 114; especially if he is relieved by legislative act in such other state from all the penalties and disabilities imposed by the decree against him: *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768, 3 South. 321. Statutes prohibiting marriage after divorce are not extraterritorial in their effect, unless made so by express words or necessary implication: *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81.

A statute prohibiting the remarriage of either party within a specified time after the rendition of a decree of divorce has no extraterritorial effect: *Willey v. Willey*, 22 Wash. 115, post, p. 923, 60 Pac. 145; overruling *In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059, holding the statutory restriction against marrying within the prohibited period to be a limitation upon the decree of divorce, rendering it inoperative during the period mentioned, and making it immaterial whether the subsequent marriage within that period occurred within or without the state. On the contrary, it was held in *Wilhite v. Wilhite*, 41 Kan. 154, 21 Pac. 173, that a marriage contracted in Oregon within six months after one of the parties had been divorced from her former husband by a decree of one of the courts of Oregon was absolutely null and void where the statute of Oregon prohibited a marriage within such time. With respect to the validity of marriages after divorce within the state the authorities are conflicting. In some cases it is held that a marriage by a guilty defendant in a divorce suit within a specified time, where such party is prohibited by statute from remarrying within such time, is void, especially where the offense has been made a felony, although the statute does not declare such a marriage to be void: *Ovitt v. Smith*, 68 Vt. 35, 33 Atl. 769; *Calloway v. Bryan*, 6 Jones, 569; *West Cambridge v. Lexington*, 1 Pick. 505, 11 Am. Dec. 231; *Cox v. Combs*, 8 B. Mon. 231; *In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059; but see remarks on this case in *Willey v. Willey*, 22 Wash. 115, 121, post, p. 923, 60 Pac. 145; *Putnam v. Putnam*, 8 Pick. 433; *Goggins v. Goggins*, 152 Mass. 533, 25 N. E. 833. So, when, by general statute, the guilty divorced party is prohibited from marrying again without leave of court, and he marries again without such leave, the subsequent marriage is invalid although the party believed he had a right to contract it: *White v. White*, 105 Mass. 325, 7 Am. Rep. 526; and see *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 515. The statute of New York, relating to divorce, prohibits the guilty defendant from marrying again during the lifetime of the other spouse, and a clause to that effect is usually inserted in the decree. A marriage in violation of such prohibition is void: *In re Tabor*, 65 N. Y. Supp. 571, 31 Misc. Rep. 579. The marriage relation does not survive the divorce, as against the guilty party. As said in *Estate of Ensign*, 103 N. Y. 284, 57 Am. Rep. 717, 8 N. E. 544: "The recent legislation which permits a divorced husband, prohibited from remarrying, to do so after five years and with the consent of the court, and the class of cases which affirm the validity of such marriage in another state over whose boundaries our own prohibition does not extend, are alike inconsistent with any doctrine which makes the marriage relation as to either of the parties remain in existence after the dissolution of the contract and the severance of the bond": Compare *Willey v. Willey*, 22 Wash. 115, 121, post, p. 923, 60 Pac. 145; and see *Atlanta v. Anderson*, 90

Ga. 481, 16 S. E. 209. But, on the other hand, there are cases holding that the marriage of a guilty defendant in a divorce suit, within the time prohibited by statute, is not absolutely void, unless it is so declared by statute, but is merely voidable: *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641; *Mason v. Mason*, 101 Ind. 25; *Willey v. Willey*, 22 Wash. 115, post, p. 923, 60 Pac. 145; *Conn v. Conn* (Kan. App.), 42 Pac. 1006. If the time of the prohibition is that in which an appeal may be taken, the marriage is voidable if the appeal is taken within the period prescribed: *Willey v. Willey*, 22 Wash. 115, post, p. 923, 60 Pac. 145; and it will become void, if, within the period inhibited, the decree is opened by the party against whom it was obtained: *Mason v. Mason*, 101 Ind. 25. Compare the subdivision, Law of the Lex Loci Contractus, supra, as to the validity of marriages after divorce, where the parties go into another state for the purpose of evading the laws of one state by marrying in another, and returning, after marriage, to the former state.

Marriage Without Consent—Force or Duress.—At common law, a marriage was absolutely void where either party did not give a legal consent, or acquiesce in the marriage, and it is now invalidated by want of consent: *Rose v. Rose*, 9 Ark. 507; *Fornhill v. Murray*, 1 Bland, 479, 18 Am. Dec. 344; *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Mountholly v. Andover*, 11 Vt. 226; *Ford v. Stier*, [1896] P. 1; as where a marriage was celebrated by a justice of the peace, without consent of the parties: *Mountholly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685; or where the bride went through the ceremony as one of betrothal and not of marriage: *Ford v. Stier* [1896], P. 1. If one of the parties to an alleged marriage, instead of assenting to the contract, positively dissents, there is no legal or valid marriage, although a ceremony is gone through with by the officiating minister or magistrate: *Roszel v. Roszel*, 73 Mich. 133, 16 Am. St. Rep. 569, 40 N. W. 858. A reluctant and passive consent to the performance of a marriage ceremony would not justify a court in annulling the marriage thus brought about: *Collins v. Ryan*, 49 La. Ann. 1710, 22 South. 920; but it might raise a question of fact which the court would leave to a jury to determine and decide whether it was a marriage between the parties: *Doe v. Wright*, 2 Houst. 49. That the marriage of parties incapable of giving consent is void, see *Marriage of Insane Persons*, infra.

It has been declared that a marriage procured by force or duress is void, at least in the sense that it may be avoided: *Mountholly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685; *Hampstead v. Plaistow*, 49 N. H. 84; *Harford v. Morris*, 4 Eng. Ecc. 575; *Anderson v. Anderson*, 74 Hun, 56, 26 N. Y. Supp. 492; *Marks v. Crume* (Ky., Feb. 1895), 29 S. W. 436; as where there was a forcible or fraudulent abduction of a ward, of very tender age, by her guardian, and a marriage between them had abroad: *Harford v. Morris*, 4 Eng. Ecc. 575. The duress need not be that of the defendant. It is sufficient if it was by the latter's relatives or friends: *Marks v. Crume* (Ky.,

Feb. 1895), 29 S. W. 436. But, while judges sometimes use the term "void" in speaking of marriages, they do not always mean, evidently, that the marriages thus spoken of are an absolute nullity, but simply voidable at the election of the party upon whom the alleged force or duress has been exercised: See *Tomppert v. Tomppert*, 13 Bush, 326, 26 Am. Rep. 197. And it is probably the result of all the authorities that a marriage is not absolutely void, but simply voidable, where consent to it was produced under the influence of error, violence, or threats: *Lacoste v. Guidroz*, 47 La. Ann. 295, 299, 16 South. 836; *Willard v. Willard*, 6 Baxt. 297, 32 Am. Rep. 529; and see *Meredith v. Meredith*, 79 Mo. App. 636. A marriage by a man under arrest to escape prosecution for a criminal offense, such as seduction or bastardy, committed against the woman he marries, though such marriage is consummated upon the advice of others, is valid. Under such circumstances, the marriage contract cannot be avoided on the ground that it was consummated under duress: *Johns v. Johns*, 44 Tex. 40; *Sickles v. Sickles*, 26 N. J. Eq. 440; *Marvin v. Marvin*, 52 Ark. 425, 20 Am. St. Rep. 191, 12 S. W. 875; though the man subsequently discovers that he could not have been convicted: *Marvin v. Marvin*, 52 Ark. 425, 20 Am. St. Rep. 191, 12 S. W. 875; and see, also, *Schwartz v. Schwartz*, 29 Ill. App. 516; *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 South. 836.

Marriages Procured by Fraud are often declared to be void: *Robertson v. Cole*, 12 Tex. 356, 365; and authorities cited in *Tomppert v. Tomppert*, 13 Bush, 326, 26 Am. Rep. 197; but the word "void" is sometimes inaccurately used for the word "voidable," and the great weight of authority is to the effect that a marriage procured by fraud is not absolutely void, but merely voidable at the suit of the injured party, during his lifetime, and that it may be declared void by judicial decree: *Tomppert v. Tomppert*, 13 Bush, 326, 26 Am. Rep. 197; *Hampstead v. Plaistow*, 49 N. H. 84, 98; *Keyes v. Keyes*, 22 N. H. 553; *Reynolds v. Reynolds*, 3 Allen, 605; *Barnes v. Wyethe*, 28 Vt. 41; *Henneger v. Lomas*, 145 Ind. 287, 298, 44 N. E. 462; *Harford v. Morris*, 4 Eng. Ecc. 575; *Ferlat v. Gojon*, 1 Hopk. Ch. 478, 14 Am. Dec. 554; *Lewis v. Lewis*, 44 Minn. 124, 20 Am. St. Rep. 559, 46 N. W. 323; *Gillett v. Gillett*, 78 Mich. 184, 43 N. W. 1101; *Todd v. Todd*, 149 Pa. St. 60, 24 Atl. 128; *Parsons v. Parsons*, 68 Vt. 95, 34 Atl. 33; *Bonaparte v. Bonaparte*, [1892] P. 402; *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 South. 646; *Lyndon v. Lyndon*, 69 Ill. 43; and for such purpose the courts have jurisdiction independently of any divorce law: *Henneger v. Lomas*, 145 Ind. 287, 298, 44 N. E. 462. A marriage procured by fraud, error, and abduction, will be vacated in equity at the suit of the innocent party: *Ferlat v. Gojon*, 1 Hopk. Ch. 478, 14 Am. Dec. 554. "It must be understood," as said by Mr. Tyler in his work on *Infancy and Coverture*, second edition, section 637, "that all irregular or unlawful marriages are not absolutely void; some may be valid and binding until repudiated by the parties, or actually nullified by the sen-

tence or decree of a court of competent jurisdiction; while others are null and void from the beginning. There is a great difference between a void and voidable marriage, which it is important to notice. A void marriage is at all times a nullity, and binds no one, and is not valid for any legal purpose whatever; it leaves the parties to it in just the same situation, to all intents and purposes, as though there had been no pretended marriage at all. In such cases, if the parties cohabit, they are adulterers and fornicators, and their offspring, if they have any, are bastards. But a voidable marriage is valid for all civil purposes, and binding upon the parties so long as it is acted upon and recognized by them, and until its nullity is declared by a competent tribunal; and if the marriage has not been dissolved by sentence or decree during the joint lives of the parties, it will be too late to apply for its avoidance, and consequently the survivor will be entitled to curtesy, dower, and the other rights of a surviving husband or wife. If the parties cohabit, their cohabitation, especially as to those who are innocent, is proper and lawful, and their offspring, if they have any, are respected as legitimate; and when the marriage is dissolved, the court usually decrees the custody of the issue to the innocent parent, and makes a provision for their education and maintenance out of the estate and property of the guilty party."

Antenuptial pregnancy by another man is, if concealed from the husband, such a fraud upon him as will justify an annulment of the marriage: *Sinclair v. Sinclair*, 57 N. J. Eq. 222, 40 Atl. 679; *Carris v. Carris*, 24 N. J. Eq. 516; *Donovan v. Donovan*, 9 Allen, 140; *Reynolds v. Reynolds*, 3 Allen, 605; *Harrison v. Harrison*, 94 Mich. 559, 34 Am. St. Rep. 364, 54 N. W. 275; contra, *Moss v. Moss*, [1897] P. 263, 274, commenting upon the decisions of the American courts; and the husband is entitled to a decree that the supposed marriage has been void ab initio: *Sinclair v. Sinclair*, 57 N. J. Eq. 222, 40 Atl. 679; but, if he himself has had improper relations with the wife before marriage, he cannot have the marriage annulled on account of his wife's false representations that she was pregnant by him: *Tait v. Tait*, 23 N. Y. Supp. 597, 3 Misc. Rep. 218; or by reason of the fact that she was pregnant by another man, although the husband was ignorant of her condition at the time of the marriage: *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412, 2 Atl. 376; *States v. States*, 37 N. J. Eq. 195; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Carris v. Carris*, 24 N. J. 516; and compare *Fairchild v. Fairchild*, 43 N. J. Eq. 473, 11 Atl. 426. As a general rule, concealment by one of the parties of personal traits or defects of character, or habits, reputation, bodily health, or other peculiar infirmities, is not sufficient ground upon which to annul a marriage: *Lewis v. Lewis*, 44 Minn. 124, 20 Am. St. Rep. 559, 46 N. W. 323. It will not be annulled for fraud because one of the parties concealed the fact of his former marriage and subsequent divorce: *Fisk v. Fisk*, 39 N. Y. Supp. 537; *Donnelly v. Strong*,

175 Mass. 157, 55 N. E. 892; or because the wife was a kleptomaniac: *Lewis v. Lewis*, 44 Minn. 124, 20 Am. St. Rep. 559, 46 N. W. 323; or because of the false representations of a party as to his character, social standing, or fortune: *Wier v. Still*, 31 Iowa, 107; unless he is a professional thief, in which case the marriage will be annulled: *Keyes v. Keyes*, 26 N. Y. Supp. 910, 6 Misc. Rep. 355. A man is entitled to a decree of annulment, on the ground of fraud, where his wife, before the marriage, concealed from him the fact that her ovaries had been removed: *Wendel v. Wendel*, 49 N. Y. Supp. 375, 22 Misc. Rep. 152; and a woman is so entitled where her husband, before the marriage, concealed from her the fact that he had a chronic and contagious venereal disease: *Anonymous*, 49 N. Y. Supp. 331, 21 Misc. Rep. 765; *Smith v. Smith*, 171 Mass. 404, 68 Am. St. Rep. 440, 50 N. E. 933. But it has been held that the concealed existence of a venereal disease known as "syphilis" in one of the parties does not justify a decree annulling the marriage on the ground of fraud: *Vondal v. Vondal*, 175 Mass. 383, 78 Am. St. Rep. 502, 56 N. E. 586. A marriage is not valid where there is a mistake respecting the person whom one of the parties intended to marry, but it is voidable only at the suit of the deceived party: *Delpit v. Young*, 51 La. Ann. 923, 929, 25 South. 547.

Marriage by Persons Under Disability.—It has been laid down as a general rule that canonical impediments to marriage, such as consanguinity, affinity, impotence, and the like, render a marriage voidable; but that civil impediments to marriage, such as want of age, idiocy, lunacy, and the like, make a marriage void ab initio: See monographic note to *Gathings v. Williams*, 44 Am. Dec. 54, discussing void and voidable marriages; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658. This test, however, must be cautiously applied, in view of the modern decisions on the validity of marriages, and in further view of statutory provisions declaring what disabilities shall be a ground for the annulment of marriage, and virtually obliterating the distinction between canonical and civil disabilities. In fact, the only safe test is to consider each disability by itself in view of the statute and decisions concerning it.

If a marriage is between persons, one of whom has no capacity to contract marriage at all, the marriage is void absolutely and ab initio, and may be inquired of in any court. Under such a marriage no civil rights can be acquired: *Gathings v. Williams*, 5 Ired. 487, 44 Am. Dec. 49; *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; *Rose v. Rose*, 9 Ark. 507; and see the subdivision *Bigamous Marriages*, *infra*. A marriage has been annulled because sexual intercourse between the parties was impossible, owing to the impotence of the husband: *L— v. B—*, [1895] P. 274; but physical incapacity for the duties of wedlock is a canonical defect rendering the marriage voidable merely, and not absolutely void: *A— v. B—*, L. R. 1 Pro. & D. 559; *Smith v. Morehead*, 6 Jones Eq. 360; *Anonymous*, 24 N. J. Eq. 19, 23; *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563. A marriage cannot, therefore, be declared void on this ground after the death of one of the parties: *A—*

v. B.—, L. R. 1 Pro. & D. 559. A husband is entitled to have his marriage annulled where his wife's ovaries were removed prior to the marriage, without his knowledge, as she was physically incapable of entering into the marriage state: *Wendell v. Wendell*, 49 N. Y. Supp. 375, 22 Misc. Rep. 152; but he is not entitled to have it annulled on the ground that she, unknown to him, had a swollen tongue and inflammation of the bladder, at the time of marriage: *Riley v. Riley*, 73 Hun, 575, 26 N. Y. Supp. 164.

Marriage by Abandoned Spouse.—In some of the states, it is provided by statute that if any person whose husband or wife shall have absented himself or herself for a specified time, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority: *Jones v. Zoller*, 29 Hun, 551; *Matter of Borrowdale*, 28 Hun, 336; *Eubanks v. Banks*, 34 Ga. 407; *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *White v. Lowe*, 1 Redf. 376; *Spicer v. Spicer*, 16 Abb. Pr., N. S., 112; *Greensborough v. Underhill*, 12 Vt. 604; *Cropsey v. McKinney*, 30 Barb. 47. Such a marriage can be declared void only on application of one of the parties to it during the lifetime of the other. It cannot be declared void collaterally, after the death of the absent spouse, in a creditor's suit: *Cropsey v. McKinney*, 30 Barb. 47. In Kentucky, it is held that a woman, whose former husband has been absent from the state of his residence more than five years, and has not been heard from within that period, is lawfully competent to enter into a marriage contract: *Strode v. Strode*, 3 Bush, 227, 96 Am. Dec. 211. See, also, *Rhea v. Rhenner*, 1 Pet. 105, as to the law of Maryland. The marriage by a wife having a former husband living is not void under the Massachusetts statute, if, at the time of marriage, the former husband had, for a period of more than seven years, entirely deserted her, and had concealed his residence from her, and she believed him to have long been dead: *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555. Such statutes do not apply to divorced persons: *In re Tabor*, 65 N. Y. Supp. 571; 31 Misc. Rep. 579; *Matter of Borrowdale*, 28 Hun, 336.

Marriage of Infants.—By the common law, the age of infants, for matrimonial purposes, was fixed at fourteen in males and twelve in females: *Koonce v. Wallace*, 7 Jones, 194, 196; and this rule has been retained in some of the states, but in others it has been changed by statute. Unless changed by statute, the age fixed by the common law is the one at which the parties may marry, but whatever may be the age fixed, a marriage entered into before that age is reached is not void but simply voidable by judicial decree: *Koonce v. Wallace*, 7 Jones, 194, 195; *People v. Slack*, 15 Mich. 193; *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496; *State v. Parker*, 106 N. C. 711, 11 S. E. 517; *Beggs v. State*, 55 Ala. 108; *State v. Cone*, 86 Wis. 498, 57 N. W. 50; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806; *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724; *Fisher v. Bernard*, 65 Vt. 663, 27 Atl.

316; *Goodwin v. Thompson*, 2 G. Greene, 329. Contra, *Shaffer v. State*, 20 Ohio, 1.

An infant under the statutory age which permits him to contract marriage is legally incapacitated from entering into such a relation, and, if he marries under such age, he may have his marriage annulled on that ground unless he ratifies and confirms it after arriving at such age: *Henneger v. Lomas*, 145 Ind. 287, 44 N. E. 462; but, until disaffirmed, the marriage is a marriage in fact, and sufficient to support a prosecution for bigamy in contracting a second marriage: *Beggs v. State*, 55 Ala. 108; *People v. Slack*, 15 Mich. 193; *State v. Cone*, 86 Wis. 498, 57 N. W. 50. The marriage of a boy in his sixteenth year, although declared by the code of Georgia to be "void," in the sense of being absolutely void, may nevertheless be ratified by his cohabiting with his wife as such after he has reached the statutory age of consent in that state, namely, seventeen years: *Smith v. Smith*, 84 Ga. 440, 450, 11 S. E. 496; and while the code of North Carolina provides that a marriage by a female under fourteen years of age, or a male person under sixteen, is "void," the courts have construed the word "void" to mean voidable. The only marriages pronounced by that code to be absolutely void are those between a white person and one of negro or Indian blood (or descent to the third generation inclusive), and bigamous marriages. The others need to be "declared void": *State v. Parker*, 106 N. C. 711, 712, 11 S. E. 517.

An action to annul a marriage on the ground of the plaintiff's want of age may be maintained before he reaches the age of legal consent: *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806. Sometimes the consent of parents or guardians is required to the marriage of parties under a specified age, but the want of this consent alone does not render the marriage void, unless the statute expressly makes it so: *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515; *Bennett v. Smith*, 21 Barb. 439; *Hunter v. Milan* (Cal., Aug., 1895), 41 Pac. 332; *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325; *Ferrie v. Public Admr.*, 4 Bradf. 28; *Governor v. Smith*, 10 Humph. 57; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63. Contra, *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300. And this is true notwithstanding statutory prohibitions: *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Hotz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; and penalties imposed upon magistrates or ministers for solemnizing marriages, where the parties are not of a certain age, without the consent of parents or guardians: *Parton v. Hervey*, 1 Gray, 119; *Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515. The only case, independently of statutory provisions, in which a marriage is absolutely void, from want of age of consent, seems to be where either party to it is below the age of seven. This period is alike in both male and female: *Note to Gathings v. Williams*, 44 Am. Dec. 57.

The statute of Michigan provides, in case of marriage between parties, either of whom is under the age of consent, that, if they shall separate during such nonage, and not cohabit together afterward, the marriage shall be deemed void, without any decree of divorce or other legal process, and this statute has been construed to mean that the marriage is to be deemed void whenever, after the disability is removed, the question of its validity may arise, and when it appears that there has been no cohabitation, after reaching the age of consent, unless such failure to cohabit is due to the desertion of the minor spouse, in which case the willingness to cohabit may be treated as equivalent to continued cohabitation: *People v. Schoonmaker*, 119 Mich. 242, 77 N. W. 934. But the Massachusetts statute, prohibiting marriages between parties under certain specified ages, without the consent of parent or guardian, and declaring every marriage between parties under the age of consent to be void if the parties separate during nonage and do not afterward cohabit, is held not to affect a marriage performed in another state between citizens of Massachusetts, and which is good in the state where it was performed: *Everett v. Morrison*, 69 Hun, 146, 23 N. Y. Supp. 377.

Marriage of Insane Persons, Idiots, etc.—A marriage between persons incapable of giving consent thereto, such as those who are insane, idiots, or non compos mentis, is, according to the great weight of authority, absolutely void: *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Foster v. Means*, 1 Spear Eq. 569, 42 Am. Dec. 332; *Crump v. Morgan*, 3 Ired. Eq. 91, 40 Am. Dec. 447; *Jenkins v. Jenkins*, 2 Dana, 102, 26 Am. Dec. 437; *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197; *Keyes v. Keyes*, 22 N. H. 553; *Gathings v. Williams*, 5 Ired. 487, 44 Am. Dec. 49; *Johnson v. Kincade*, 2 Ired. Eq. 470; *Clement v. Mattison*, 3 Rich. 93; *Waymire v. Jetmore*, 22 Ohio St. 271; *Rawdon v. Rawdon*, 28 Ala. 565; *Countess v. Earl*, 1 Hagg. Ecc. 355; especially where it is declared void by the statute: *Unity v. Belgrade*, 76 Me. 419. A marriage with a legally declared lunatic is, of course, absolutely void ab initio, and may be so declared by the courts in a direct proceeding at any time: *Sims v. Sims*, 121 N. C. 297, 61 Am. St. Rep. 665, 28 N. E. 407.

It is not our purpose here to show what mental unsoundness will incapacitate from entering into the marriage relation, but it may be said that, while every unsoundness of mind will not avoid the contract, the marriage will be invalid if one of the parties is so imbecile as not to understand the nature and obligation of the contract: *Rawdon v. Rawdon*, 28 Ala. 565; *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Chapline v. Stone*, 77 Mo. App. 523; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197; *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Middleborough v. Rochester*, 12 Mass. 363; *Doe v. Doe*, 1 Edm. Sel. Cas. 344; *Countess v. Earle*, 1

Hagg. Ecc. 355; Kern v. Kern, 51 N. J. Eq. 574, 26 Atl. 837; note to Gathings v. Williams, 44 Am. Dec. 56. A marriage by one having congenital imbecility of mind to a degree rendering him incapable of consent is void ab initio: Waymire v. Jetmore, 22 Ohio St. 271; and insanity from delirium tremens will avoid a contract of marriage, but it is a question for the jury to decide whether the party was really insane or only intoxicated: Clement v. Mattison, 3 Rich. 93. If a party, when married, is so much intoxicated as to be non compos mentis, and does not know what he is doing, being, for the time, deprived of reason, the marriage is invalid, but it is not invalid if the intoxication is of a less degree than that stated: Prine v. Prine, 36 Fla. 676, 690, 18 South. 781. That particular form of insanity consisting of a morbid propensity on the part of the wife to steal, commonly denominated "kleptomania," existing at the time of marriage, and unknown to the husband, does not entitle him to a decree annulling the marriage: Lewis v. Lewis, 44 Minn. 124, 20 Am. St. Rep. 559, 46 N. W. 323. A lapse of twenty-two years after the discovery of alleged insanity in one of the spouses has been held a bar to a bill to avoid the marriage on that ground: Rawdon v. Rawdon, 28 Ala. 565; but see Chapline v. Stone, 77 Mo. App. 523.

The marriage of an insane person being absolutely void, ab initio, its invalidity may be shown in any court, and between any parties, either in the lifetime of the parties thereto, or after their death, and either directly or collaterally: Orchardson v. Cofield, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197; Unity v. Belgrade, 76 Me. 419, 421; Bell v. Bennett, 73 Ga. 784; Medlock v. Merritt, 102 Ga. 212, 29 S. E. 185; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774. But in North Carolina the question as to whether a de facto marriage is void ab initio for want of mental capacity in the husband must be tried directly: State v. Setzer, 97 N. C. 252, 2 Am. St. Rep. 290, 1 S. E. 558; Williamson v. Williams, 3 Jones Eq. 446; and see Gathings v. Williams, 5 Ired. 487, 44 Am. Dec. 49, and note; and the statute of Massachusetts provides that the validity of a marriage shall not be questioned, in the trial of a collateral issue, on account of the insanity or idiocy of either party: Goshen v. Richmond, 4 Allen, 458.

Although a judgment annulling a marriage, void on account of the insanity of one of the contracting parties at the time of marriage, is unnecessary, yet it will be supported, as conducive to good order and decorum: Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Wightman v. Wightman, 4 Johns. Ch. 343; Waymire v. Jetmore, 22 Ohio St. 271, 274; Rawdon v. Rawdon, 28 Ala. 565. A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, and this without any new solemnization: Prine v. Prine, 36 Fla. 676, 690, 18 South. 781; Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275; but a marriage void on account of lunacy cannot be cured and rendered valid merely by cohabitation with the lunatic after his restoration to reason: Sims v. Sims, 121 N. C. 297, 61 Am. St. Rep. 665, 28 S. E. 407.

In Vermont, marriages of lunatics and idiots and other marriages not declared to be absolutely void by the statute, are considered valid unless avoided by proper proceedings, although, when so avoided, they are void from the beginning: *Wiser v. Lockwood*, 42 Vt. 720.

Bigamous Marriages.—A marriage is void, and no decree is required to avoid it, if either of the contracting parties has a husband or wife then living and undivorced: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Collins v. Voorhees*, 47 N. J. Eq. 315, 24 Am. St. Rep. 412, 20 Atl. 676; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802; *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; note to *Smith v. Smith*, 46 Am. Dec. 130-134, discussing the effects of a marriage during the continuance of a prior valid marriage; *Smart v. Whaley*, 6 Smedes & M. 308; *State v. Parker*, 106 N. C. 711, 712, 11 S. E. 517; *Harrison v. Lincoln*, 48 Me. 205; *Drummond v. Irish*, 52 Iowa, 41, 2 N. W. 622; *Ward v. Bailey*, 118 N. C. 55, 23 S. E. 926; *Webster v. Webster*, 58 N. H. 3; *Succession of Taylor*, 39 La. Ann. 823, 2 South. 581; *Randlett v. Rice*, 141 Mass. 385, 6 N. E. 238; *Summerlin v. Livingston*, 15 La. Ann. 519; *Freeman v. Freeman*, 49 N. J. Eq. 102, 23 Atl. 113; *Monnier v. Contejean*, 45 La. Ann. 419, 12 South. 623; *Sellers v. Davis*, 12 Tenn. 502; *Kenley v. Kenley*, 2 Yeates, 207; *Heffner v. Heffner*, 23 Pa. St. 104; *Janes v. Janes*, 5 Blackf. 141; although such living husband or wife is absent, has not been heard from for many years, and is believed, by the spouse remarrying, to be dead: *Kenley v. Kenley*, 2 Yeates, 206; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Janes v. Janes*, 5 Blackf. 141; *Martin v. Martin*, 22 Ala. 86; *Glass v. Glass*, 114 Mass. 563; *Zule v. Zule*, 1 N. J. Eq. 96; *Pain v. Pain*, 37 Mo. App. 110; *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 40 N. E. 846; *Reynolds v. State*, 58 Neb. 49, 78 N. W. 483. In Missouri, however, it is held that, where a woman, acting upon reliable information that her former husband is dead, marries again, the marriage is legal, in the absence of evidence that the former husband is alive, especially after the lapse of many years: *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497.

So, the marriage of a man and woman, when one of them has a husband or wife then living and undivorced, is void, although the parties in contracting the second marriage acted in the honest belief of a prior divorce: *Gordon v. Gordon*, 141 Ill. 160, 33 Am. St. Rep. 294, 30 N. E. 446; *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975; *Teter v. Teter*, 88 Ind. 494; *Reynolds v. State*, 58 Neb. 49, 78 N. W. 483; and a marriage contracted while a previous marriage of the husband remains unannulled, though he had previously obtained a void decree of divorce in another state, has no legal force whatever: *Collins v. Voorhees*, 47 N. J. Eq. 315, 24 Am. St. Rep. 412, 20 Atl. 676. Married persons are incapable of contracting marriage with others after an order that a judgment

of divorce be entered but before such judgment is entered: *State v. Eaton*, 85 Wis. 587, 39 Am. St. Rep. 867, 55 N. W. 890; but see *People v. Booth*, 121 Mich. 131, 79 N. W. 1100. In Oklahoma, either party to a divorce suit who marries any other person within six months from the date of the decree of divorcement is guilty of bigamy: *Niece v. Territory*, 9 Okla. 535, 60 Pac. 300. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries: *Davis v. Beason*, 133 U. S. 333, 341, 10 Sup. Ct. Rep. 299; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556; *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. Rep. 278.

A bigamous marriage being void at common law for all purposes (*Rooney v. Rooney*, 54 N. J. Eq. 231, 34 Atl. 682; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737), the deceived party may marry again without a decree of nullity: *Patterson v. Gaines*, 6 How. 550, 592; *Martin v. Martin*, 22 Ala. 86; *Shaak's Estate*, 4 Brewst. 305. If a first marriage is void, because one of the parties had a spouse living at the time, the second marriage is valid without a decree annulling the first: *Dare v. Dare*, 52 N. J. Eq. 195, 27 Atl. 654. If a person under the age of consent marries without the consent of his parents, and afterward marries another woman, before a decree of divorce or annulment of the first marriage is obtained, he may be legally convicted of bigamy, for his first marriage was voidable only and not void: *State v. Cone*, 86 Wis. 498, 57 N. W. 50. See, also, *People v. Beevers*, 99 Cal. 286, 33 Pac. 844. A marriage between parties, one of whom has a husband or wife living, being absolutely void, does not affect the rights of the other party, and this is not altered by the fact that the statute makes provision for the annulment of such marriages: *Drummond v. Irish*, 52 Iowa, 41; and see *Succession of Navarro*, 24 La. Ann. 298. If either of the contracting parties to a marriage has a husband or wife then living and undivorced, the marriage is void. It is good for no legal purpose, and its invalidity may be proved at any time, in any court, and by any person: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Rooney v. Rooney*, 54 N. J. Eq. 231, 241, 34 Atl. 682; but a decree of nullity is valuable by way of estoppel: *Rooney v. Rooney*, 54 N. J. Eq. 231, 241, 34 Atl. 682.

It is provided, however, by statute, in some of the states, that if any person, whose husband or wife shall have absented himself or herself, for a specified time, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity is pronounced by a court of competent authority; and such a marriage is voidable only until annulled. When judicially annulled, it is void only from the date of the judgment: *Price v. Price*, 124 N. Y. 589, 599, 27 N. E. 383; *Taylor v. Taylor*, 55 N. Y. Supp. 1052; *Alixamian v. Alixamian*, 59 N. Y. Supp. 1068; *Charles v. Charles*, 41 Minn. 201, 42 N. W. 935; and see *Strode*

v. Strode, 3 Bush, 227, 96 Am. Dec. 211; Hiram v. Pierce, 45 Me. 367, 71 Am. Dec. 555. When two persons have contracted marriage in good faith in the belief that each can lawfully marry, and it is subsequently discovered that the marriage is void because one of the parties has a former husband or wife alive, a libel for annulling the marriage cannot be maintained by the survivor, after the death of the other party: Rawson v. Rawson, 156 Mass. 578, 31 N. E. 653. Other cases hold that, if a man or woman remarries while he or she has a wife or husband living, the second marriage is void, if the first husband or wife be living, and undivorced, and the first marriage unannulled, whatever length of time may have elapsed, although there may be a presumption of death, and the statute shields the party remarrying from the penal consequences of bigamy and provides for making the issue of the second marriage legitimate: Thomas v. Thomas, 124 Pa. St. 646; 17 Atl. 182; Clarke's Estate, 173 Pa. St. 451, 455, 34 Atl. 68; Ward v. Bailey, 118 N. C. 55, 23 S. E. 926; Williamson v. Parisien, 1 Johns. Ch. 389; Glass v. Glass, 114 Mass. 563; Teter v. Teter, 88 Ind. 494; Leonard v. Braswell, 99 Ky. 528, 539, 36 S. W. 684.

Incestuous Marriages "contravene the voice of nature, degrade the family, offend decency and morals," and, when absolutely interdicted by statute, are, of course, void: Beggs v. State, 55 Ala. 108; Baity v. Cranfill, 91 N. C. 293, 49 Am. Rep. 641; Hayes v. Rollins, 68 N. H. 191, 44 Atl. 176; Morgan v. State, 11 Ala. 289. Marriages between persons in the direct lineal line of consanguinity, and between brothers and sisters in the collateral line, are incestuous and void, as against the law of nature, independently of any church canon, or of any statutory prohibition: Wightman v. Wightman, 4 Johns. Ch. 343, 348; Campbell v. Campbell, 8 Abb. N. C. 363, 373; and relatives of the half blood are, equally with those of the whole blood, included in the degrees of consanguinity within which marriages are prohibited: Campbell v. Campbell, 8 Abb. N. C. 363; People v. Jenness, 5 Mich. 305. In England, the marriage of a man with the sister of his deceased wife is prohibited by statute as contrary to God's law, and void: Queen v. St. Giles, 11 Q. B. 173, 235; Brook v. Brook, 9 H. L. Cas. 193. The marriage of a man with the daughter of the half-sister of his deceased wife is also void by the English statute: Queen v. Brighton, 1 Best & S. 447; and a marriage within the prohibited degrees of consanguinity or affinity is void, though one of the parties is illegitimate: Queen v. Brighton, 1 Best & S. 447; Queen v. St. Giles, 11 Q. B. 173.

A marriage between a woman and the brother of her former husband is prohibited by English law, and will be annulled on the ground of affinity: Aughtie v. Aughtie, 1 Phillim, 201. A marriage between uncle and niece is not absolutely void, but only voidable, and courts will not annul it after the death of either party: Bonham v. Badgley, 2 Gilm. 622; Parker's Appeal, 44 Pa. St. 309; Bowers v. Bowers, 10 Rich. Eq. 551, 73 Am. Dec. 99; and see *Suo*

cession of Bulssiere, 41 La. Ann. 217, 5 South. 668. Neither can a marriage between a nephew and his uncle's wife, though contrary to the statute, be declared void, or so treated, in a collateral proceeding after the death of one of the parties, where the statute has neither declared such marriage void, nor made it expressly voidable except during the life of both parties: *Stevenson v. Gray*, 17 B. Mon. 193, 222. In Vermont, a marriage prohibited by law on account of consanguinity or affinity between the parties is declared to be void without the decree of a court: *Barney v. Cunes*, 68 Vt. 51, 52, 33 Atl. 897. But "when a marriage is declared to be void," said the court, in *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658, "it does not necessarily mean void 'ab initio.' Reason and justice would imply it was void from the time its nullity should be pronounced by a court of competent jurisdiction, not that it should be so construed whenever brought incidentally in question." Hence, the Maryland act of 1777, declaratory of the canon as part of the common law, and prohibiting marriage between persons related within certain degrees of affinity and consanguinity under certain penalties, declaring that such marriages should be "void," and giving to the general court jurisdiction to hear and determine upon such marriages, did not contemplate that, by the use of the word "void" such marriages should be absolutely void ipso facto, but only void upon judgment and decree of the court during the lifetime of the parties: *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658.

Marriages void by the law of nature where contracted are void everywhere. All civilized nations, and particularly the whole Christian world, agree that marriages in the direct line of consanguinity, and between the nearest collaterals are incestuous. Consequently such marriages will be held void everywhere, because they were null in the place of the contract. But the prohibited degrees include, besides persons in the direct line, brothers and sisters only, and no other collateral kindred. Beyond these few cases, in which all states agree, there is a difference as to what marriages are incestuous, and in such cases the admitted international law leaves it to each state to say what is incestuous in respect to its own subjects: See *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Wightman v. Wightman*, 4 Johns. Ch. 343, 349; *Sutton v. Warren*, 10 Met. 451; *Jackson v. Jackson*, 82 Md. 17, 29, 33 Atl. 317; *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *Stevenson v. Gray*, 17 B. Mon. 193. Hence, a marriage, valid in a state where it is contracted, is valid in another state, if not incestuous by the law of nature, or not made void by statute, although it would be void in the latter state if contracted there: *Sutton v. Warren*, 10 Met. 451; *Stevenson v. Gray*, 17 B. Mon. 193. In England, a marriage with the sister of a deceased wife is held incestuous, and, between persons domiciled in England, it will be held void wherever contracted: *Brook v. Brook*, 9 H. L. Cas. 193.

"But," said the court, in *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678, "it does not follow that such a marriage, contracted in a state where it was lawful, between subjects of that state, would be held void in England if the parties afterward became domiciled there. There is no reason to think it would be."

Marriages Between Whites and Indians.—Marriages between white men and Indian women are valid in some of the states: *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *First Nat. Bank v. Sharpe*, 12 Tex. Civ. App. 223, 33 S. W. 676; *Meister v. Moore*, 96 U. S. 76; and see *La Riviere v. La Riviere*, 97 Mo. 80, 10 S. W. 840; *Earl v. Godley*, 42 Minn. 361, 18 Am. St. Rep. 517, 44 N. W. 254; note to *Johnston v. Johnston*, 77 Am. Dec. 606. The validity of marriage between Indians is to be tested by the law of the state in which it is contracted: *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376. In other states, a marriage between a white man and an Indian woman is void: *State v. Parker*, 106 N. C. 711, 712; 11 S. E. 517; *In re Walker's Estate* (Ariz., Sept., 1896), 46 Pac. 67; and there can, at least, be no common-law marriage between such parties in the state of Washington: *Kelley v. Kitsap County*, 5 Wash. 521, 32 Pac. 554; though celebrated in accordance with Indian customs: *Wilbur's Estate*, 14 Wash. 242, 44 Pac. 262. It is held in that state that a marriage between a white man and an Indian woman, if prohibited by the law of the state or territory, is void, though she was, at the time, a member of a tribe living with her people upon a reservation set apart for them, and the marriage was contracted in the form proper for a valid marriage had both the parties thereto been Indians: *Wilbur's Estate*, 8 Wash. 35, 40 Am. St. Rep. 886, 35 Pac. 407; *Walker's Estate* (Ariz., Sept. 1896), 46 Pac. 67.

Marriages Between White Persons and Colored Persons, of African Descent, with a certain proportion of African blood in their veins, are prohibited by statute, in some of the states, and are expressly declared by it to be void: *State v. Hairston*, 63 N. C. 451; *State v. Reinhardt*, 63 N. C. 547; *Woodard v. Blue*, 103 N. C. 109, 113, 9 S. E. 492; *State v. Parker*, 106 N. C. 711, 712, 11 S. E. 517; *Greenhow v. James*, 80 Va. 636, 56 Am. Rep. 603, 607; *State v. Melton*, Busb. 49; *State v. Watters*, 3 Ired. 455; *State v. Hooper*, 5 Ired. 201; *Bailey v. Fiske*, 34 Me. 77. The statute of North Carolina, declaring void all marriages between white persons and free negroes and persons of color, includes only cases where such persons of color are within the third degree: *State v. Melton*, Busb. 49; *Woodard v. Blue*, 103 N. C. 109, 113, 9 S. E. 492. The code of Georgia forever prohibits the marriage relation between white persons and persons of African descent, and declares such marriages null and void: *Scott v. State*, 39 Ga. 321, 323. A marriage between a white person and a person of mixed blood to the third generation, inclusive, is prohibited by the statute of Tennessee, and is void ab initio; *Carter v. Montgomery*, 2 Tenn. Ch. 216, 225. Such

statutes are not in conflict with the state or federal constitution, or with the civil rights bill: *State v. Hairston*, 63 N. C. 451; and in Louisiana, where such marriages are prohibited, the courts refused, before the war, to recognize a marriage between a free white person and a free person of color, contracted outside of that state: *Succession of Minvielle*, 15 La. Ann. 342; *Dupre v. Boulard*, 10 La. Ann. 411. Contra, *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; but see *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683. In fact, a marriage between a white person and a negro is, in some of the states, made a criminal offense: *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739; *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *State v. Bell*, 7 Baxt. 12, 32 Am. Rep. 549; *Kinney v. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690; *State v. Jackson*, 80 Mo. 175, 50 Am. Rep. 499; note to *Greenhow v. James*, 56 Am. Rep. 607; without violating the state or federal constitution: *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131; *Lonas v. State*, 3 Heisk. 287. Contra, *Burns v. State*, 48 Ala. 195, 17 Am. Rep. 34.

Slave Marriages were Void, during the times of slavery, as a general rule, because a slave had no capacity to make a contract, and could not, therefore, make one of marriage; and such marriages could be treated by the parties thereto as a nullity, upon their emancipation from slavery, though they might thereafter become man and wife by electing to do so and cohabiting as such: *Scott v. Raub*, 88 Va. 721, 723, 14 S. E. 178; *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505; *McReynolds v. State*, 5 Coldw. 18; *Means v. State*, 99 Ga. 205, 25 S. E. 682; *McDowell v. Sapp*, 39 Ohio St. 558; *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534; *Adams v. Johnson*, 65 N. C. 537; *Pierre v. Fontenette*, 25 La. Ann. 617; *Ross v. Ross*, 34 La. Ann. 860; *Comer v. Comer*, 91 Ga. 316, 18 S. E. 300; *Butler v. Butler*, 161 Ill. 451, 44 N. E. 203; *Lewis v. King*, 180 Ill. 259, 54 N. E. 330; *United States v. Route*, 33 Fed. 246; and, by virtue of the statute, in some states, a continuance of the relation of man and wife, after their emancipation, made the former slaves man and wife, without any further act or formal ceremony on their part: *Erwin v. Bailey*, 123 N. C. 628, 635, 31 S. E. 844; *Williams v. State*, 67 Ga. 260; *Wallace v. Godfrey*, 42 Fed. 812; *Jackson v. State*, 53 Ala. 472; *State v. Melton*, 120 N. C. 591, 26 S. E. 933. Contra, *Estill v. Rogers*, 1 Bush, 62, holding that there can be, under the Kentucky statute, no such thing as a legal marriage by cohabitation and recognition alone; that all marriages not solemnized or contracted in the presence of an authorized person or society, are void; and that the statute applies to colored persons as well as to others: *Estill v. Rogers*, 1 Bush, 62. See, also, *Jones v. Jones*, 45 Md. 144; *Minor v. Jones*, 2 Redf. 289.

A slave's second marriage, after obtaining his freedom, disaffirmed a former marriage, contracted in slavery, and made it void ab initio: *Butler v. Butler*, 161 Ill. 451, 44 N. E. 203. The statute of Georgia requiring slaves who had lived as man and wife before emancipation, to select if they wished to live in the marriage relation, contemplated the selection and marriage ceremony to take place immediately, but postponing compliance only made cohabitation penal; and it did not disable the parties from complying, or inhibit compliance, at any time, however late: *Comer v. Comer*, 91 Ga. 314, 18 S. E. 300. A failure to perform the duties required by the statute in such cases was a misdemeanor only: *State v. Adams*, 65 N. C. 537; and a common-law marriage between them was good, notwithstanding the neglect of statutory forms relating to the subject and imposing a penalty, unless the statute itself contained express words avoiding the marriage because of a failure to conform to such statutory requirements: *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534. In Indiana, before the war, the marriage of a negro resident of that state with a negro woman who had gone into the state was void, under constitutional and statutory provisions prohibiting negroes or mulattoes from coming into or settling in the state, declaring all contracts made with those coming in contrary to such prohibition void, and imposing the penalty of a fine upon anyone who employed or encouraged such negro to remain in the state: *Barkshire v. State*, 7 Ind. 389, 65 Am. Dec. 738.

BYRNES v. ST. PAUL.

[78 Minn. 205, 80 N. W. 959.]

MUNICIPAL CORPORATIONS—POLICE OFFICERS—UNLAWFUL DISCHARGE OF—RIGHT TO COMPENSATION.—If an appointive municipal officer, such as a policeman, is unlawfully dismissed and prevented from rendering any service, but makes no complaint to the mayor or to the city council, and no attempt to secure a reinstatement, but apparently acquiesces in the dismissal, he thereby abandons and relinquishes his office, or "resigns by implication," and cannot, therefore, recover of the municipality the compensation incident to the office during the period in which he performs no service.

Action to recover compensation as a police officer. The plaintiff recovered for six days ending June 13, 1894, and he appealed from an order denying a motion for a new trial.

Thompson & Thompson, for the appellant.

James E. Markham, for the respondent.

207 COLLINS, J. For more than one year prior to June 6, 1894, plaintiff had been a policeman in the city of St. Paul, assigned to duty as a detective, and required to report for service to another police officer, known as "chief of detectives." On that day the chief of police demanded that plaintiff resign from the force, which he refused to do, and continued to report for service as before. June 13th the chief of police met plaintiff at the central station, and, after directing him to turn over his keys and badge (city property) to the desk sergeant, said: "I have no more use for you." In response to the chief's demand, plaintiff immediately delivered the keys and badge to the sergeant. He understood from what was said that the chief intended to discharge him from the service, and omitted to report for duty for a week or ten days. He then, and frequently thereafter, for about two years, applied to the chief of detectives to be assigned to duty. His applications were refused. He performed no service, and his successor was appointed and served. July 15, 1894, he signed the city pay-roll, and received a check for seven days' service—that being the unpaid time—and made no claim for anything further. He never took any steps looking toward a reinstatement, never spoke to the chief of police about the matter, never called the attention of the mayor or of the city council to the fact that the chief of police had deprived him of his keys and badge, had refused to allow him to go upon duty, and had attempted summarily to discharge him from the service. He did not assert in any manner that he was still a member of the force. He waited until February 18, ²⁰⁸ 1898, and then commenced this action, claiming the right to recover salary from June 7, 1894, up to February 15, 1898, three days before the summons was served.

It stands admitted that the chief of police had no authority under the charter to dismiss a policeman. This authority rests with the mayor; but, if the officer has held his position for six months immediately preceding a dismissal, it does not take effect until the common council concurs. The action of the chief, when notifying plaintiff that he had no further use for him, was, when taken alone, of no effect. But plaintiff acquiesced in this irregular and unauthorized act. He not only obeyed the order to surrender his keys and badge, which, in itself, was of no particular consequence (see *Galvin v. St. Paul*, 58 Minn. 475, 59 N. W. 1102), but he left the station, did not return for a week or ten days, and, so far as could be judged

from appearances, made no objection to the decision of the chief. He acted as if he intended to abandon the office without remonstrance. Later he reported to the chief of detectives, but this officer had no power to restore him to duty, or, if he had been improperly removed, to reinstate him upon the force. He allowed another person to be appointed to his place, to do the work, and to receive the compensation. He failed to notify the mayor that the chief had attempted to dismiss him from the service. He did not inform the city council that he had been improperly discharged, and without its concurrence, or that the chief had refused to allow him to render an equivalent for his salary.

In short, he made no protest or demand, as he might and should have done if, in good faith, he was of the opinion that he was still a member of the police force, and entitled to his pay. It was his especial duty to seek to be reinstated in his office by formal demand, and, if necessary, by appropriate legal proceedings, in view of the peculiar relation in which he stood to the defendant, of which he now seeks to avail himself. When he did nothing of this kind, when he did not even demand his salary from the city, to permit a claim of this nature to be accumulated against it would be unreasonable. An appointive municipal officer, as was plaintiff, unlawfully dismissed and prevented from rendering any service, who has made no complaint to the mayor or to the city council, has not ²⁰⁹ attempted to secure a reinstatement, but who has apparently acquiesced in the dismissal, cannot recover of the municipality the compensation incident to the office during the period in which he has performed no service: *Hagan v. Brooklyn*, 126 N. Y. 643, 27 N. E. 265; *Phillips v. Boston*, 150 Mass. 491, 23 N. E. 202; *Bernard v. Mayor etc.*, 27 N. J. L. 412; *Throop on Public Officers*, sec. 407. The plaintiff voluntarily abandoned and relinquished his office, or, as it is sometimes expressed, he "resigned by implication." This disposes of the case.

Order affirmed.

MUNICIPAL CORPORATIONS. — A CITY POLICEMAN, WRONGFULLY REMOVED, cannot recover from the city his salary paid to his successor, until after an adjudication establishing his right: *Selby v. Portland*, 14 Or. 243, 58 Am. Rep. 307, 12 Pac. 377. But see *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458.

HEBNER v. GREAT NORTHERN RAILWAY COMPANY.

[78 Minn. 289, 80 N. W. 1128.]

LIBEL.—A COMMUNICATION, TO BE PRIVILEGED. must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery, and, in the absence of such proof, the plaintiff cannot recover.

LIBEL—PRIVILEGED COMMUNICATION—RECORD OF RAILWAY EMPLOYÉ—PUBLICATION.—If a railway company keeps a record of each of its employés for the information of those whose business it is to employ men for the company's service, and showing the reasons why men have been discharged, but issues "service cards" to those who have left its employment, for the purpose of assisting men to obtain work when going from one company to another, a telegraph operator and station agent, who has been dismissed from the service of the company, according to its record, for being "insolent and abusive to company's patrons," and who has applied to the company's superintendent of telegraphs for a service card, cannot maintain an action for libel against the company for the publication of the words quoted, where, upon such application, the record-book was produced and the entry read, in the company's office, by one of the clerks to another, in the presence of the superintendent and the plaintiff, for the purpose of filling out the card; where both clerks were interested and acting strictly within the line of their duty; where the card was then filled out with the derogatory words, signed by the superintendent, and handed to the applicant; and where this was the only publication complained of. Such a communication was of a privileged character, made on a privileged occasion, and cast upon the plaintiff the necessity of showing malice in fact.

Action for libel. The plaintiff appealed from an order denying a motion for a new trial.

T. J. McDermott and S. L. Pierce, for the appellant.

C. Wellington, for the respondent.

290 COLLINS, J. Action for libel, and at the conclusion of the trial a verdict was directed and returned in favor of the defendant corporation.

Plaintiff had been in its employ at Browns Valley, as a telegraph operator and station agent, for about four years prior to the alleged publication, and was then discharged. As was the custom of defendant with all of its employés, a record of plaintiff's service, and the reason for his discharge, was kept in the general office, and from the record it appeared that he had been insolent and abusive to the patrons of defendant company. It was also the custom of the company to issue, on the request of

any person who had left its employ, what was known as a "service card," in which appeared a part of this record, and such a card was issued to plaintiff. It was signed by the superintendent of the defendant's telegraph lines, and under the heading of "Remarks" were the words: "Dismissed; insolent and abusive to company's patrons." It was held below that there had been a sufficient publication of these words by reading the written record in the presence of clerks in the superintendent's office ²⁹¹ when plaintiff applied for his service card, and also that they were libelous on their face, if untrue; and it is conceded on this appeal that the only question to be determined is whether the evidence adduced at the trial would have warranted the jury in finding that the defendant, when publishing these words of and concerning plaintiff, was actuated by malice, or did otherwise than a reasonably prudent man would have done under the same circumstances.

It was undisputed that the object of the defendant in keeping a record of each of its employes, and, in case men had been discharged, for what reason, is that those having to employ may be properly advised of the qualifications or disqualifications of all who have theretofore been in the defendant's service. The absolute propriety and necessity of having this information, where it is accessible to those whose work it is to select the hundreds of men capable of properly performing arduous and responsible duties in connection with defendant's business as a common carrier is obvious. It was also undisputed at the trial that the real purpose of the service card is to assist men to obtain employment when going from one company to another, although such a card might prove a very serious obstacle to securing a new position when presented by a man discharged for cause or supposed cause, because the reason for such discharge would be stated. It is also beyond question that such a card may or may not be shown by one seeking employment, for this is a matter optional with the holder.

It stands conceded that this was a highly privileged communication, and that, in the absence of express malice on its part, there could be no recovery as against defendant. It was made upon a subject matter in which the person communicating it had a deep interest, as well as a duty to perform, and was made to a person having a corresponding interest and duty. If one of defendant's servants had demonstrated his unfitness for a position held by him, it was for its interest, as well as for the interest of the public, that steps should be taken which would

render the servant qualified and capable, or that he be dismissed. It would not only be for the interest of the company to remedy the evil, and to act so as to stop all future complaints, but it would be a matter of duty to the public. The record was made in one of the books of the corporation, kept ²⁹² for its own information, and the only publication complained of was when the record was communicated by one of the clerks employed by defendant in the office of the telegraph superintendent to another clerk, both being interested, and both acting strictly within the line of duty, and also acting that they might have information upon which to fill out the card which plaintiff had requested might be delivered to him. There was no undue publicity, or even public dissemination of the contents of the book; and there is nothing in the record before us which indicates that care was not taken to confine this information to such persons as were directly interested, and whose duty it was to know the reason for plaintiff's dismissal from defendant's service. It is conclusively established that there was no wanton disregard of plaintiff's feelings or welfare.

The communication being of a privileged character, and having been made on a privileged occasion only, the *prima facie* effect was to overcome and rebut the quality or element of malice, and to cast upon plaintiff the necessity of showing malice in fact; that is, that the defendant was actuated by ill-will in what it caused to be done and said, with a design causelessly and wantonly to injure the plaintiff. The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover: *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, 2 Atl. 513; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555; *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 166, 33 N. W. 181.

The plaintiff's efforts to show malice on defendant's part were confined to testimony which counsel claim tended to show that the charge of insolence and abuse toward those who patronized the company was false, and also to evidence of the existence of certain circumstances which counsel contend indicate bad faith when making the record, and also when publishing it. The charges of bad behavior which were lodged with defendant

company were with respect to plaintiff's conduct toward commercial travelers who had business at his station; and plaintiff's proofs, aside from his unqualified ²⁹³ denial (to which reference will be made later) of having been insolent and abusive, and the testimony of a man who had worked with him for a short time, were from residents of the town who had from time to time seen him at work. But counsel admit that on the evidence the jury would have been warranted in finding either way upon the issue as to the truth or falsity of the charges. And it is quite certain that on this testimony as to his general conduct toward patrons a jury would not have been justified in finding that plaintiff had not been impudent when dealing with traveling men, if they had not misrepresented him. And there was absolutely nothing in this class of testimony, taken by itself, which would tend to show that defendant did not have probable cause to believe these charges to be true when making its record.

The fact was that, after the claim had come to defendant that plaintiff was treating its patrons with insolence, the traveling freight agent was ordered to investigate, and for that purpose visited the plaintiff at Browns Valley. He there talked with plaintiff, informing him that he was accused of being insolent and abusive in his dealings with traveling men. This circumstance the plaintiff admitted, and also that he was then told by the agent that he must be more civil and courteous in the future, if he expected to retain his place. The agent had testified that, in response, plaintiff had answered that he might have been impatient and uncivil, but that he would try to do better; and, when plaintiff was asked if he had not so responded, his reply was that he "could not exactly remember." He would not deny that he did so answer when questioned by the traveling freight agent. The evidence was, however, that the caution and reprimand did no good, and that on account of the continued complaints, which were also investigated, the plaintiff was afterward discharged upon the report and advice of the agent. It is evident from this testimony that the plaintiff did not deny the truth of the charges when he was told that they had been made, and he cannot now be heard to say that the defendant itself did not believe them to be true when it dismissed him from its employ.

But this was not all. Howard, one of the traveling men who had ²⁹⁴ complained of plaintiff's conduct, had just cause for charging him with incivility, on plaintiff's own statement. This

man had reached the station late, and the bus driver was talking with plaintiff about checking his baggage. The latter was at his desk, the driver at the ticket wicket, a few feet distant, while Howard stood a few feet beyond. The plaintiff at first declined to issue checks, and then stated that a man who would come so late "ought to be kicked off the depot platform." It is urged that perhaps this was not heard by Howard, who was farther away from the plaintiff than was the driver, to whom the statement was made. Howard was not at the trial, and possibly, though close by, did not hear the remark. But it makes no difference what person was abused, or concerning whom the plaintiff was insolent. He was none the less impudent and insulting because his remark was directly addressed to the bus driver, instead of to the owner of the trunks. There was nothing in the evidence bearing upon the truth or falsity of the charges which would have justified the jurors in finding that the defendant did not act in perfect good faith. Nor did the circumstances relied on by counsel tend to show malice. Good faith in the premises would require that defendant exercise reasonable care, and nothing more, and there were no circumstances on which a claim could be maintained that there was an absence of this care.

It has been urged by counsel that because the traveling freight agent declined to furnish plaintiff with the names of persons who had complained, and to give him a hearing at which he should be confronted with his accusers, and because the agent made no inquiries of the residents at Browns Valley, it was for the jury to say whether the defendant used reasonable care. These are the circumstances appearing in evidence, and before referred to. It would seem somewhat singular if it should be held that the failure to have an investigation, at which plaintiff could be heard and the witnesses examined, was evidence that defendant had not acted with reasonable care, or that there was an absence of reasonable care because the traveling freight agent refused to plunge the patrons of the road into a quarrel with plaintiff, as would have been the result if their names had been furnished, or because he failed to inquire of the residents of Browns Valley as to plaintiff's treatment ²⁹⁵ of certain traveling men whose complaints he was investigating. That defendant might act in good faith, and with the best of motives, did not demand of it any such care as that. And it must also be remembered that plaintiff had practically admitted the charges against him when questioned by the agent,

and further that in one case, at least, he stood convicted of insolence on his own statement as to what occurred. If, on his own admissions, the charges seemed to be true to some extent, what further was necessary in the way of investigation, or what more was required in the exercise of reasonable care?

In conclusion, on this question of malice, it should be stated that there is no claim here that defendant's employés (the men who had observed plaintiff's conduct and had reported it, or those who investigated the charges, including the agent, and informed the company of the result of their investigations) manifested the slightest ill-will or disposition to be unfair toward the plaintiff, and no claim that the clerks in the office of the superintendent of telegraphs, or the superintendent himself, exhibited anything but the kindest spirit toward plaintiff when making the publication of which he complains. We quite agree with the learned trial judge, who said "that the evidence fails to show want of probable cause such as would justify a reasonably prudent man in making the entry, and that the fact of malice, essential to plaintiff's recovery, was not established."

Order affirmed.

LIBEL—PRIVILEGED COMMUNICATIONS.—A communication made in good faith upon any subject in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding duty or interest: *Note to Trebby v. Transcript Pub. Co.*, 73 Am. St. Rep. 333. If the matter complained of as libelous is privileged, the burden of proving malice lies on the plaintiff: *Bearce v. Bass*, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411.

LIBEL—PRIVILEGED COMMUNICATIONS.—A RAILWAY COMPANY having reason to believe that a discharged employé, seeking an important position in the railway service, is incompetent, careless, or otherwise unfit, is under obligation to communicate its knowledge or belief to all who are likely to employ him in such service, and if such published communication is made in good faith, it is privileged: *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555. A railway company has a right to print and circulate to its officers and employés a discharge list, in order to guard against re-employing men who have proved themselves incompetent and untrustworthy, and an ex-employé, whose name appears thereon as discharged for carelessness, cannot maintain an action of libel against the company, in the absence of proof that such publication was known to be false and actuated by malice: *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555.

McCORMICK HARVESTING MACHINE COMPANY v.
BALFANY.

[78 Minn. 370, 81 N. W. 10.]

SALES—NO ACTION FOR PRICE BEFORE DELIVERY.
Before a seller can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title, and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained.

SALES—CONSTRUCTIVE DELIVERY—WHAT IS NOT.—
If a person orders a machine of a described kind, to be shipped to him, but there is no appropriation of any particular machine to the buyer, or to his contract, a mere statement of the seller to the buyer, upon receiving a number of like machines, that the latter's machine is ready to be delivered, and pointing to a number on hand, any one of which would comply with the terms of the order, does not amount to a constructive delivery of any particular machine.

Action to recover the price of a harvester and binder. There was a verdict for the defendant, and the plaintiff appealed from an order denying a motion for a new trial.

Frank Clague and Somerville & Olsen, for the appellant.

Seward & Burchard, for the respondent.

371 COLLINS, J. We assume that when plaintiff, through its agents, who went to defendant's house for that purpose, procured and received the orders signed by defendant, made out on one of plaintiff's blanks, and furnished to defendant a copy thereof, there was an acceptance by plaintiff of defendant's proposition to buy a machine, and thus the order became a complete executory contract, as between these parties, the plaintiff agreeing to sell, and the defendant agreeing to buy, the "right-hand" machine therein described: See *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794. This contract bore date April 15, 1898, and required that plaintiff should ship the machine to defendant, consigned to the care of Gebhard & Ruth, plaintiff's local agents, at Lamberton, Minnesota, on or about July 15th of that year.

Now, the undisputed testimony is that something over sixty of these machines, alike in every respect, were shipped by plaintiff to these local agents, reaching Lamberton about July 15th. Part of them were unloaded from the cars, and taken to the

agents' place of business or sheds, where about six of the number were unpacked and set up ready for delivery. Defendant was at the sheds soon afterward, and was told that the machine he had ordered was ready. His reply was that he wanted a "left-hand" machine, and would not take a "right-hand." He positively refused to take a machine answering the requirements of the order, and also positively refused to settle, either by paying in cash or by giving his notes. No particular machine was designated or marked as for defendant when the lot was shipped by plaintiff, none was consigned to him in care of the local agents or otherwise, and none was set apart or pointed out to defendant as the one he had ordered when he was at the agents' place of business. Nor did the local agents designate or set apart any particular machine at any time as defendant's, although they have constantly kept on their premises, ready for delivery to him, a machine complying in all respects with the description in the order.

There was no actual delivery of a machine to defendant; for he expressly refused to take possession, and plaintiff cannot recover the contract price therefor, unless the facts as shown prove that ³⁷² there was a constructive delivery to him: *Jones v. Schneider*, 22 Minn. 279. Before a seller can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title, and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained: *Newmark on Sales*, sec. 391; 21 *Am. & Eng. Ency. of Law*, 576. See, also, *Rail v. Little Falls Lumber Co.*, 47 Minn. 422, 50 N. W. 471.

The facts now before us show conclusively that there was no constructive delivery of a machine to defendant. The order, in terms, authorized the plaintiff to select and appropriate a machine to the contract, and to defendant, by designating the same, and it expressly directed that it be consigned to him in care of the local agents. But this was not done. There was no designation of any machine as defendant's, and none consigned to him. Nor was there at any time an appropriation of any particular machine by the agents to defendant's contract out of the large number which had been received at their place of business. The machine was not specified to which the contract would attach, or, in legal phrase, there was

no appropriation of a machine to defendant, or to his contract, and no property passed. Stating to defendant that his machine was ready to be delivered, and pointing to a number then on hand, either of which would comply with the terms of the order, did not amount to constructive delivery of any particular machine, nor was there any act on plaintiff's part which would pass the title so as to vest it in defendant, and thus authorize a recovery of the contract price. The result of permitting such a recovery would be nothing more or less than enforcing specific performance of a contract for the sale and delivery of chattels, contrary to the general rule.

As on the evidence the plaintiff could not recover the contract price, it is not necessary to consider or pass upon that part of the charge which bore upon the alleged "countermand" of the order. ³⁷³ If there was error on this point (see *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756), it was error without prejudice.

Order affirmed.

SALES.—AN ACTION FOR THE PRICE OF GOODS sold cannot be maintained until delivery is proved: *Greenleaf v. Gallagher*, 93 Me. 549, 74 Am. St. Rep. 371, 45 Atl. 829; and delivery is incomplete while anything remains to be done: *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241. A sale of chattels is not complete until the property has been delivered to the purchaser so as to impose an obligation on him to pay the purchase price: *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357.

BOWERS v. MISSISSIPPI & RUM RIVER BOOM CO.

[78 Minn. 398, 81 N. W. 208.]

REAL PROPERTY—INJURY TO—PERMANENCY.—THE TEST whether an injury to real estate, by the wrongful act of another, is permanent, in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.

NUISANCE—CONTINUING—SUCCESSIVE SUITS—FORMER JUDGMENT IS NOT A BAR.—If the defendant has placed piling in a river opposite the plaintiff's farm, whereby the water is turned from its natural course and the plaintiff's land is washed away by water, ice, and logs thus turned against it, the obstruction is, as to the plaintiff, a continuing trespass or nuisance, for which successive actions may be brought for damages as they

accrue, although the defendant was authorized by law to place and maintain the piling in the river to facilitate the floating and driving of logs therein, and notwithstanding the fact that no part of the piling is on the plaintiff's land. Hence, a judgment recovered for such injuries is not a bar to a subsequent action, brought several years afterward, for like injuries occurring to the land, subsequently, to the commencement of the former action.

Everett Hammons, for the appellant.

J. B. Atwater, for the respondent.

401 **START, C. J.** This is an action to recover damages which the plaintiff claims to have sustained by the act of the defendant in placing piling in the Mississippi river opposite his farm, whereby the water in the river was turned from its natural course, and carried upon and against his land, washing away the shores thereof. The answer admitted and alleged that in the year 1887 the defendant, in the exercise of its charter powers as a corporation engaged in the business of booming and driving logs, placed the piling in the river for the purpose of keeping floating logs off from the sand bars therein, but that the defendant removed the piling in 1895. It further alleged that on May 4, 1895, the plaintiff duly recovered judgment against the defendant for the same cause of action alleged in the complaint in this action, and that such judgment has been paid and satisfied. The reply denied that the judgment pleaded as a bar was for the same cause of action as that alleged in the complaint herein. The trial court, at the close of the evidence, directed a verdict for the defendant, on the ground that the judgment in the prior action was a bar to this one, and, further, that the evidence was not sufficient to establish a cause of action against the defendant. The plaintiff appealed from an order denying his motion for a new trial.

If the former judgment is not a bar, the evidence, although conflicting, was sufficient to sustain a verdict for the plaintiff. The question, then, for our consideration, is whether the trial court erred in holding that the prior judgment was a bar to this action.

There was evidence, as to this question, tending to establish **402** these facts: The defendant, in the year 1887, placed the piling in the river, and has ever since kept it there. The effect of this piling was and still is to turn the water, ice, and logs against plaintiff's land, whereby its shores were and are cut and washed away. The plaintiff, on February 5, 1895, brought an action against the defendant to recover the dam-

ages sustained by him by reason of such acts of the defendant, and recovered a judgment therefor in the sum of four hundred dollars, which is the prior judgment in question. It has been satisfied. In the prior action prospective damages were not claimed nor assessed. It was established in that action, as the jury found, that four and one-half acres of the plaintiff's land had been washed away by reason of the defendant's wrongful acts prior to the commencement of this action, and the court instructed the jury that the measure of damages was "the difference between the actual value of the land as it was before the washing and as it now is with the washing away." Since February 5, 1895, some four acres more of the plaintiff's land have been washed away by reason of such piling being so maintained in the river, and this action is for the recovery of damages therefor.

The plaintiff was bound to recover in his first action all the damages to which he was entitled; and if he was then entitled to recover for all injuries, past, present, and future, to his land, by reason of the acts of the defendant in placing and maintaining the piling in the river, the judgment in the prior action is a bar to this one; for the plaintiff, if such were the case, could not split up his cause of action, and recover a part of his damages in the first action, and then bring this action for the rest of them. The defendant claims that the first action was just such a case, and that the trial court correctly held the judgment to be a bar.

The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act: 8 Am. & Eng. Ency. of Law, 687; *Uline v. New York etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536; *Valley Ry. Co. v. Franz*, 43 Ohio St. 623, 4 ⁴⁰³ N. E. 88; *Wells v. New Haven etc. Co.*, 151 Mass. 46, 50, 21 Am. St. Rep. 423, 23 N. E. 724. This last case refers to *Fowle v. New Haven etc. Co.*, 107 Mass. 352, relied upon by the defendant in this case, and indirectly disapproves it. The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury. But where the in-

jury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting.

Fortunately, we are relieved from any uncertainty as to the application of the rule to the facts of this case by the decisions of this court; for they conclusively establish the proposition that the acts of the defendant, in placing and maintaining the piling in the river, whereby the water, logs, and ice were driven upon the shore of the plaintiff's land, were in the nature of a continuing trespass or nuisance, and that successive actions may be brought for the damages as they accrue: *Harrington v. St. Paul etc. R. Co.*, 17 Minn. 188, 215; *Adams v. Hastings etc. R. Co.*, 18 Minn. 236, 260; *Brakken v. Minneapolis etc. Ry. Co.*, 29 Minn. 41, 11 N. W. 124; *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; *Adams v. Chicago etc. Ry. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629; *Lamm v. Chicago etc. Ry. Co.*, 45 Minn. 71, 47 N. W. 455. The facts in these cases, except that of *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339, are similar. In each case the railway company built and maintained its roadbed, upon which to operate its cars, in a public street or highway, upon which the plaintiff's land abutted, and it was held that the acts of the defendant were a continuing trespass or nuisance, for which successive actions could be brought. The question is tersely and clearly discussed, and directly decided, in the last case cited. The satisfaction of the judgment in the first action brought by the plaintiff to recover the damages already accrued was not a purchase of the right to continue the trespass or nuisance, for it was not the equivalent of a judgment in condemnation proceedings: *Lamm v. Chicago etc. Ry. Co.*, 45 Minn. 71, 47 N. W. 455.

The defendant seeks to distinguish its case from the cases in this ⁴⁰⁴ court which we have cited, on the ground that it was authorized by law to place and maintain the piling in the river to facilitate the floating and driving of logs therein, and that no part of the piling was on the land of the plaintiff, and no negligence in the premises on its part is claimed. All these facts may be conceded, and still the act of the defendant in maintaining the piling be a continuing nuisance as to the plaintiff. The obstruction was lawful as to the public, but the legislature could not authorize the defendant to maintain

it as against a private party whom it injured: *Hueston v. Mississippi etc. Boom Co.*, 76 Minn. 251, 79 N. W. 92. The fact that the obstruction did not physically touch the plaintiff's land is immaterial; for while the trespass or injury is not direct, but indirect, the plaintiff's damages are just as great as if some part of the obstruction rested on his land.

In the case of *Byrne v. Minneapolis etc. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, the cause of the injury to the plaintiff's land was the construction and maintenance of the defendant's roadbed, no part of which was on the plaintiff's land, so as to obstruct a natural watercourse. This was held to be a continuing nuisance, for which successive actions could be maintained: See, also, *Jungblum v. Minneapolis etc. R. Co.*, 70 Minn. 160, 72 N. W. 971. In the case of *Adams v. Chicago etc. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, the defendant, by virtue of an ordinance of the city of Winona, lawfully constructed and operated its railway, without negligence, in and along a public street of the city upon which the plaintiff's land fronted, no part of which was physically touched by the railway, but it was injured thereby, and it was held that the measure of damages was the depreciation of the rental value of the land to the commencement of the action.

The act of the defendant in the case at bar in placing and maintaining the piling in the river was, whatever it may have been as to the public, as to the plaintiff a continuing trespass or nuisance, and he was entitled to bring successive actions to recover his damages as they accrued. It follows that the trial court erred in holding the former judgment a bar.

Order reversed and new trial granted.

CONTINUING NUISANCE—SUCCESSIVE SUITS—FORMER JUDGMENT IS NOT A BAR.—Every continuance of a nuisance makes a new one creating a new liability, and, if the nuisance is continued, one recovery does not bar a subsequent action: *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, 39 N. E. 909. If trespasses and nuisances are not of a permanent character, damages can be recovered only for the injury sustained up to the time of the commencement of the action; but as to trespasses and nuisances which are of a permanent character, a single recovery may be had for the whole damages resulting from the act: *Denver City etc. Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565; *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484; and note to *St. Louis etc. Ry. v. Biggs*, 20 Am. St. Rep. 177.

DAVIS v. SWEDISH-AMERICAN NATIONAL BANK.

[78 Minn. 408, 80 N. W. 953, 81 N. W. 210.]

TRUSTS—DENIAL OF COMPENSATION TO TRUSTEE, SUCH AS AN ASSIGNEE FOR THE BENEFIT OF CREDITORS. If a trustee, such as an assignee for the benefit of creditors, has been guilty of fraud, willful default, or gross negligence in the management of the trust estate, compensation for his services will be denied to him whether he claims it under the rule of equity or the statute relating to fees of assignees and their attorneys in insolvency proceedings, for the statute and the equity rule are not inconsistent, and the former does not abrogate the latter.

ATTORNEYS AT LAW ARE NOT ENTITLED TO ANY PAY for their services, where they have been guilty of actual fraud or bad faith toward their clients in the matter of their employment.

TRUSTS—MINGLING OF FUNDS—INTEREST.—If a trustee, such as an assignee for the benefit of creditors, mingles the trust fund with his own money, or uses it in his private business, he will be charged with simple interest at the legal rate, unless he receives or makes more than that, in which case he must pay more.

A JUDGMENT FOR COSTS AND DISBURSEMENTS IS THE PROPERTY of the party recovering it, and not of his attorney, though the latter has a lien thereon for his services. Hence, an assignee for the benefit of creditors is properly charged with the amount of such a judgment collected by his attorneys.

Presentation of a final account, by Davis, as assignee for the benefit of creditors. The bank interposed objections to its allowance. From both orders mentioned in the opinion, the assignee and his attorneys, Merrick and others, appealed, but the appeal of the attorneys was dismissed in the supreme court, on motion.

Simon Meyers and William H. Donahue, for the appellant Davis.

M. H. Boutelle, for the appellants Merrick and others.

A. Ueland, for the respondents.

413 START, C. J. On December 12, 1894, Jacob Skoll made an assignment for the benefit of his creditors, pursuant to the insolvency laws of this state, to Joseph M. Davis. He accepted the trust, and on June 24, 1898, he presented to the district court of the county of Hennepin his final account as such assignee, showing receipts, \$7,217.28, disbursements, \$1,732.37, and asked its allowance; also, an allowance of \$750 for his services as assignee. Attached to the account was a bill

of his attorneys for \$1,810 fees and \$197.75 disbursements, which was also presented for allowance. Testimony was taken August 2, 1898, and the court thereafter, and on November 29, 1898, filed its order disallowing both assignee's and attorneys' fees; charging the assignee with an item of \$58.58, costs paid to and collected by his attorneys on an appeal to this court; also, charging him with interest on the funds in his hands from April 12, 1895, until distribution is made.

On December 19, 1898, he filed a petition for a rehearing, and for a modification of this order. The court thereupon made its order for a hearing on the petition on January 7, 1899, and staying proceedings on the first order until such hearing, and a decision thereon. Attached to the petition for a hearing was an account for money claimed to have been actually paid, prior to the making of the first petition, to his attorneys, for fees and disbursements, amounting in the aggregate to \$733.40. Such proceedings were had upon the last petition that on September 23, 1899, the court made its order denying the petition, except that the assignee was allowed a credit for \$67.50 omitted from his original account. He appealed from both orders.

It is proper here to state that the attorneys representing the assignee on this appeal were not his attorneys at any time prior to the filing of the petition for a rehearing. If we understand the claim of appellants' counsel as to these two orders, it is, in effect, that the second order takes the place of the first one, and that the findings of fact in the former, and the evidence offered on the petition for a rehearing, are alone to be considered on the appeal. Such is not the case, for both orders must be considered as practically one order. The second is in fact just what it purports to be on its face, namely, a modification of the original order as to the item of \$67.50. All of the findings of fact in the original order, and the legal conclusions or directions based thereon, remain, except as modified by the second order. The question, then, for our decision, is whether such findings of fact are supported by the evidence; and, if so, are such conclusions correct. This involves a consideration of all of the evidence received on both hearings, and a history of the trust estate, as disclosed by the evidence.

1. The trial court found as a fact that the assignee and his attorneys in the management of the trust estate were guilty of gross misconduct, bad faith, and actual fraud. This find-

ing was not ⁴¹⁵ modified by the second order, and we are to inquire whether it is supported by the evidence. So far as the finding relates to the assignee, it is earnestly contended that the evidence does not sustain the finding. We have examined the record with the care befitting the gravity of the charge, and have reached the conclusion that the evidence sustains the finding. It is neither practicable nor desirable here to state and analyze in detail the evidence, which is voluminous. We deem it sufficient to refer only to the evidence as to the conduct of the assignee and his attorneys in relation to the claim of Joseph Robitshek against the trust estate. The evidence tends to show these facts:

The First National Bank of Minneapolis had a claim against the insolvent, Skoll, amounting to \$17,000, which was secured by a second mortgage on his homestead. The claim was presented to the assignee for allowance, who disallowed it, and the bank appealed to the district court. While the appeal was pending the bank commenced an action to foreclose its mortgage, a decree of foreclosure was had and the mortgaged premises were sold to the bank for \$1,000. Before the sale was confirmed, the claim of the bank was sold to Robitshek for \$1,800, and the claim was then again presented to the assignee, who allowed it at \$17,000. The foreclosure action was dismissed, the mortgage released, and the appeal of the bank from the disallowance of its claim was also dismissed. The negotiations leading to these results were conducted by the insolvent, Skoll, and the attorneys of the assignee. After the allowance of this claim of \$17,000 by the assignee, the Swedish-American Bank appealed, as a creditor, therefrom. In the district court, Robitshek appeared by an independent attorney, and filed his complaint, asking the court to allow the claim of \$17,000 in his favor, and to adjudge it to be a legal claim against the trust estate. The assignee appeared and answered, by his attorneys, admitting all of the allegations in the complaint, and demanding judgment that his action in allowing the claim be affirmed. The appealing creditor answered, and successfully defended against the allowance of the claim, the trial court finding as a fact that the money paid to the bank for its claim was not the money of Robitshek, but that it was paid for and on behalf of the insolvent, Skoll, to enable him to ⁴¹⁶ secure a release of his homestead from the mortgage, and to participate in the distribution of the trust estate. Thereupon the assignee united with Robitshek in a motion to set

aside the finding of the court and for a new trial. The motion was denied, and the assignee appealed from the order to this court. The order was affirmed: See *Robitshek v. Swedish-American Nat. Bank*, 68 Minn. 206, 71 N. W. 7.

After the order of the district court disallowing the claim was affirmed in this court, and judgment entered accordingly, Robitshek procured from one of the judges of the district court an order permitting him to present his claim to the assignee, who was directed to act upon it by allowing or disallowing it. A copy of this order, with the claim, was presented to the assignee by one of his attorneys, and he again promptly allowed it. This order and allowance were afterward set aside by the district court in proceedings taken by creditors. Further attempts were made to secure the allowance of this \$17,000 claim against the trust estate, but they were defeated by the vigilance of creditors. An allowance of \$350 was made by the order of the district court to such creditors out of the trust estate for the fees of their attorney in successfully opposing the allowance of the Robitshek claim; also, for \$69.39 for disbursements incurred in proceedings to obtain the right of creditors to share in the trust estate without releasing their claims. The assignee appealed to this court, and the decision of the district court was affirmed, except as to the \$69.39: See *Swedish-American Nat. Bank v. Davis*, 71 Minn. 508, 74 N. W. 286.

There was other evidence on the trial tending to show other acts of misconduct and bad faith on the part of the assignee and his attorneys in the management of the trust estate. As to the attorneys of the assignee, the evidence, taken as a whole, unquestionably supports the finding in question of the trial court. In considering the evidence as to the assignee, the fact that he was wrongly advised and directed by his attorney must not be lost sight of; but, making due allowance for this fact, and assuming, as we must, that he is a man of ordinary sense, we are of the opinion that the finding is also sustained by the evidence as to him.

2. It is further claimed by counsel for the assignee that the conclusion ⁴¹⁷ of the trial court that he was not entitled to any compensation for his services is not justified by its finding of fact as to his conduct and that of his attorneys, for the reason that his right to such compensation is not a matter of judicial discretion, but a vested right, secured by statute (Laws 1895, c. 66, sec. 6), which provides that the court shall de-

termine specifically and allow the reasonable value of the services performed by the assignee or receiver and his attorney.

The statute aside, the law as to compensation to trustees for their services is well settled. In England, the rule is that no compensation will be allowed to trustees for their services in the management of the trust estate, but it is now the general equity rule in the United States that trustees are entitled to reasonable and just compensation for their services. The rule is just and politic, for the best way to secure honest services is to give honest pay. It is equally well settled that if a trustee has been guilty of fraud, willful default, or gross negligence in the management of the trust estate, compensation for his services, to which he would otherwise be entitled, will, as a general rule, be denied to him: *Notes to Gibson's Case*, 1 Bland, 138, 17 Am. Dec. 266-274; 2 *Perry on Trusts*, sec. 919; 27 Am. & Eng. Ency. of Law, 187. See *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 65 N. W. 74. This last rule is also wise and wholesome—especially so when applied to officers of the court, such as assignees and receivers; for its just enforcement has a tendency to secure an honest and faithful discharge of official trusts, and to curb the temptation to abuse them for selfish purposes.

The statute relied on by the assignee in this case must be construed with reference to the equity rule. Now, whether the right of a trustee to compensation rests upon the equity rule, or upon the express provision of the statute, the reason for the rule that an unfaithful trustee will be dismissed empty handed is the same, and the statute will not be construed as abrogating the rule unless an intention to do so is clearly manifest upon its face. Some courts have held that, where a statute specifically fixes the compensation which an assignee or executor or administrator shall receive, he is entitled to the statutory compensation, without reference to his good or bad faith in managing the trust estate: *In re Fitzgerald's Estate*, 57 Wis. 508, 15 N. W. 794. The statute, however, which we are considering, does not attempt to prescribe an inflexible rule as to the compensation of assignees or receivers. Under our insolvency law, the court administers the trust through an assignee or receiver, on equitable principles, except as otherwise expressly provided. The statute and the equity rule are not inconsistent, and we hold that the former does not abrogate the latter. It therefore follows that the trial court did

not err in refusing to allow the assignee compensation for his services.

3. The relation of the attorneys of the assignee in this case to the court and to the trust estate was in many respects similar to that of the assignee. It was one of trust and confidence. Their employment as attorneys for the assignee extended to everything connected with the settlement of the trust estate necessary or proper to be done by an attorney. The interest which they undertook to represent was not that of the insolvent or any particular creditor, but the trust estate as represented by the assignee. The contract which the law implied from their employment was that they should render faithful and honest service to the estate. If they have violated this contract, they are not entitled to any compensation for their services; for the rule is, that if an attorney is guilty of actual fraud or bad faith toward his client in the matter of his employment, he is not entitled to any pay for his services. The basis of this rule is good morals and a sound public policy, and it should be enforced in all cases where the fraud of the attorney is established by clear and satisfactory proof. The trial court having found that the attorneys of the assignee were guilty of actual fraud and bad faith in the matter of their employment, it follows that they are not entitled to any compensation for their services out of the trust estate; hence the trial court rightly refused to allow the assignee anything on account of such services, although he had paid his attorneys in part for such services. The assignee claims that, of the \$733.40 paid by him to his attorneys, a portion thereof was for legitimate disbursements made by them on account of the estate. The evidence tends to show that \$197.75 of the amount paid was for disbursements, but it does not appear from either of the orders made by the trial court that the \$197.75 for disbursements ⁴¹⁹ by the attorneys was not allowed, except as to items of disbursements on account of the litigation concerning the Robitshek claim, which of course were not a legitimate charge against the estate.

4. The trial court found as a fact that the assignee used the funds of the trust estate in his own business, and charged him with interest thereon from April 12, 1895, subject to reduction on account of any legitimate disbursements thereafter made. The finding is supported by the evidence. The assignee, however, claims that the conclusion that he must be charged with interest on the trust fund does not follow from

the mere fact that he used it in his own business, and relies in support of his contention on the case of *In re Shotwell*, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078. The decision in the case cited cannot be extended as an authority beyond the particular facts of that case, which may be distinguished from the one at bar by the fact that there was in that case no finding that the trustee used the trust fund in his own business. The facts in that case were that the trustee deposited the trust fund with an unquestionably solvent firm, of which he was a member.

"There was no proof that the assignee or the firm of which he was a member used the money, or made a profit out of it; there was no delay in the payment of dividends, no failure in the performance of a duty, and no breach of trust with respect to the trust funds."

The general rule as to charging trustees with interest was stated by this court, after hearing able and exhaustive arguments, in the case of *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 414, 65 N. W. 74, as follows: "Whatever may be the rule in England, the general rule which seems to be established in the United States by the great weight of authority is that, if an executor or trustee mingles the trust fund with his own money, or uses it in his private business, he will be charged with simple interest at the rate established by law as the legal rate, in the absence of special agreements. The rule is subject to the qualification that if he receives or makes more than legal interest he shall pay more: *Judd v. Dike*, 30 Minn. 380, 15 N. W. 672; 1 *Perry on Trusts*, sec. 468; *Schouler on Executors*, sec. 538; 2 *Woerner's American Law of Administration*, sec. 511; *Walls v. Walker*, 37 Cal. 424, 99 Am. Dec. 296, and note; 3 *Williams on Executors*, 7th Am. ed., 363, 365, 404, 407. This rule, while it may work hardship in special cases, is based upon justice and a sound public policy. In justice, because, as held by ⁴²⁰ Chancellor Kent in *Mumford v. Murray*, 6 Johns. Ch. 1, the trustee who mingles the trust money with his own, and uses it in his own business, must pay interest, for the reason that he uses it as his own. 'It forms, therefore, a very just and clear case for interest.' In a sound policy, because it prevents abuses by taking away all temptation to executors or trustees to use the trust fund in their private business. To relax the rule, as some courts have done, because the trustee acted in good faith, or did not hazard the

fund in trade or speculation, would render the rule uncertain, and invite the evils it is intended to prevent."

Such is the settled law of this state. It follows that the assignee in this case was, upon the trial court's finding of fact, properly chargeable with interest. If, as he claims, he has, ever since the making of the court's first finding in this matter, left the entire trust fund on deposit in his name as assignee, it does not affect the correctness of the court's conclusion; for he might have stopped the running of interest by a distribution of the fund, or by applying to the court for an order touching the custody of the fund pending the hearing and final determination of his petition for a rehearing.

5. The last claim of the assignee is that the court erred in charging him with the item of \$58.58. This sum was collected by his attorneys on a judgment of this court in favor of the assignee for his costs and disbursements. A judgment for costs and disbursements is the property of the party recovering it, and not of his attorney—subject, however, to the lien of the latter for his services: 5 Ency. of Pl. & Pr. 122. It does not appear from the record that the claim of the assignee against his attorneys for the amount of his judgment is uncollectible; hence it does not appear that the court erred in charging him with the amount thereof

Orders affirmed.

TRUSTS—RIGHT OF TRUSTEE TO COMPENSATION.—WANT OF FIDELITY forfeits a trustee's right to compensation, upon obvious principles of justice. Hence, if the trustee is dishonest, or unfaithful, or negligent, or reckless in the performance of the duties of his trust, no compensation will be allowed him: See monographic note to Gibson's Case, 17 Am. Dec. 266, 274, on the compensation of trustees.

TRUST FUNDS—COMMINGLING OF—INTEREST.—A trustee mixing trust funds with his own is liable for interest: Hodges' Estate, 66 Vt. 70, 44 Am. St. Rep. 820, 28 Atl. 663.

AN ATTORNEY'S LIEN ON A JUDGMENT FOR COSTS is discussed in the monographic note to *Hanna v. Island Coal Co.*, 51 Am. St. Rep. 273.

DUXBURY v. DAHLE.

[78 Minn. 427, 81 N. W. 198.]

ATTACHMENT AGAINST NONRESIDENTS—JURISDICTION.—THE AFFIDAVIT required by statute as a prerequisite to the issuance of a writ of attachment against a nonresident is jurisdictional, and if none is filed, or if one is filed which wholly fails to set out some fact made essential by the statute, no writ can lawfully issue.

ATTACHMENT AGAINST NONRESIDENTS—JURISDICTION--DEFECTIVE AFFIDAVIT.—Under a statute which requires the affidavit for a writ of attachment against a nonresident to specify "the ground" of the plaintiff's claim, there is no jurisdiction to allow the writ where the affidavit wholly fails to state the grounds of such claim.

ATTACHMENT AGAINST NONRESIDENTS—COLLATERAL ATTACK.—If a writ of attachment is issued upon an affidavit which fails to state the ground of the plaintiff's claim, the same and all subsequent proceedings are void, where the defendant fails to appear; and where the complaint shows such defect in the affidavit, it affirmatively appears that the proceedings were void, and they may, therefore, be collaterally attacked.

James O'Brien, for the appellant.

Duxbury & Duxbury, for the respondent.

428 BROWN, J. This is an action in ejectment to recover the possession of eighty acres of land situated in Houston county. One John B. Koetting was the former owner of the land, and both parties claimed title through him—the plaintiff, under and pursuant to certain attachment proceedings, and the defendant through various mesne conveyances. The plaintiff's asserted title, if valid, is superior to defendant's. So the question with respect to the validity of the attachment proceedings under which plaintiff so claims title is the only one which requires consideration. As we find such proceedings fatally defective, no other question need be considered. The plaintiff had judgment in the district court, and defendant appealed.

Said Koetting was the owner of said land on February 2, 1894. On that day one John Barth, receiver, commenced an action against said Koetting in the district court of Houston county to recover upon a judgment theretofore rendered in his favor and against Koetting in the circuit court of Milwaukee county, Wisconsin, for the sum of one hundred and eleven thousand four hundred and forty-nine dollars and seventy-four cents. Koetting was not a resident of this state, and, to obtain jurisdiction in said action so commenced in said

district court of Houston county, said Barth caused to be filed with the clerk of said district court an affidavit for a writ of attachment against his property, setting forth therein such non-residence of Koetting. Upon such affidavit, together with a proper bond, a writ of attachment was allowed by the court commissioner and issued by the clerk, under and pursuant to which the land in controversy was levied upon and attached. The summons in the action was served by publication, and on May 12, 1894, judgment was rendered and entered on default in favor of said Barth and against said Koetting for the sum of one hundred and fifteen thousand six hundred and sixty-nine dollars and sixteen cents. Execution was issued upon this judgment, the land levied upon and sold, and at the sale struck off to one Samuel Kuster for eight hundred dollars. ⁴²⁹ The plaintiff has succeeded to Kuster's title.

The complaint in this action sets out plaintiff's title in *extenso*. The commencement of the action in the district court of Houston county, the affidavit for attachment, bond, entry of judgment, issue of execution, and sale thereunder, and all other facts leading to plaintiff's title, are fully set out. The answer puts in issue about all the allegations of the complaint, and calls in question the validity of the attachment proceedings.

It is contended by defendant that the attachment proceedings were null and void, for the reason that the affidavit for the writ was defective and insufficient, and conferred no jurisdiction on the court to issue or allow the writ. The affidavit is set out in the complaint, and the portion objected to is as follows: "That a cause of action exists against the defendant and in favor of said plaintiff therein, and the amount of said plaintiff's claim therein is ——— sum of one hundred and eleven thousand four hundred and forty-nine and seventy-four one hundredths dollars, and the ground thereof is as follows: that is to say, that the defendant is not a resident of this state."

There is no other or further statement in the affidavit with reference to the ground of plaintiff's cause of action or claim. The General Statutes of 1894, section 5289, provides, among other things, that a writ of attachment "shall be allowed whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof."

It is issued upon the order of the judge of the district court or court commissioner, in whom no discretion is vested. No investigation is to be made as to the truth of the facts set out

in the affidavit. If an affidavit in the form of the statute be filed, the writ must issue. The proceeding by attachment against the property of nonresidents is purely statutory. Jurisdiction in such cases extends to the property attached, and no further. It is in derogation of the common law, and the statutory requirements must be substantially, if not strictly, pursued and complied with. If there be a fatal defect in any jurisdictional prerequisite, the proceedings are ⁴³⁰ invalid, even though a writ valid on its face may have been issued, and a levy made thereunder. The general rule is, that the affidavit is the foundation of the writ; and if none be filed, or one be filed which wholly fails to set out some fact required by law to be stated therein, there is no jurisdiction, and the proceedings are null and void.

There is no question but that the affidavit set out in the complaint, and which was the basis of the writ in question, is defective, in not stating the ground of plaintiff's claim. There is no attempt at a compliance with the statutes in that respect. It is the understanding of the bar of this state, so far as our knowledge extends, that a defect of this character is fatal to the jurisdiction of the court to allow the writ; and, if a writ be allowed and issued upon such an affidavit, the same and all subsequent proceedings thereunder are null and void. This is the doctrine and rule laid down by text-writers generally, and is in accord with the great weight of authority: Waples on Attachment, 2d ed., sec. 157; 1 Shinn on Attachment, sec. 127; Drake on Attachment, 7th ed., sec. 87 et seq.; Van Fleet on Collateral Attack, sec. 263; 3 Am. & Eng. Ency. of Pl. & Pr. 4, and cases cited. We hold, in line with these authorities, that the affidavit required by our statutes as a prerequisite to the issuance of a writ of attachment is jurisdictional; and if none be filed, or one be filed which wholly fails to set out some fact made essential by the statute, such as shown in this case, no writ can lawfully issue. We are not unmindful of the fact that the property seized under the writ and brought into court is what the court finally exercises jurisdiction over, but we cannot subscribe to the proposition that the steps pointed out by statutes to obtain such writ from the court are inconsequential, and in no sense jurisdictional.

The defect in the affidavit cannot be cured by amendment. Although amendments are permitted and allowed in most of the states as to informal errors and omissions, defects in matters of substance cannot be thus cured, except where provided

for by statutes. This necessarily follows from the fact that the affidavit is jurisdictional: 1 Am. & Eng. Ency. of Pl. & Pr. 680; 1 Shinn on Attachment, sec. 152.

The defect in the affidavit appears from the record, and is set out ⁴³¹ in the complaint. It thus affirmatively appears upon the face of the complaint that the proceedings under which plaintiff claims title to the land are void for want of jurisdiction, and such proceedings may be attacked collaterally: *Drake* on Attachment, sec. 876 et seq., and cases cited.

The case of *Morrison v. Lovejoy*, 6 Minn. 117 (183), is cited to the proposition that the affidavit is not jurisdictional. That case is not in point. Under the statutes in force when that case was decided, it was necessary that it be made to appear by affidavit that a cause of action existed against defendant; and the court there held that, inasmuch as the allowance of the writ involved a determination that such cause of action existed, it was a judicial act. But the statute on which that decision was based has since been changed, and no such determination by the officer allowing the writ is now necessary. The writ must issue, under existing statutes, upon the filing of the proper affidavit. The difference between the two statutes is pointed out in *Braley v. Byrnes*, 20 Minn. 389 (435).

Counsel also cite, as sustaining plaintiff's position, *Cooper v. Reynolds*, 10 Wall. 308, *Matthews v. Densmore*, 109 U. S. 216, 3 Sup. Ct. Rep. 126, and *Voorhees v. Jackson*, 10 Pet. 449. We have here under consideration, not a question whether a particular proceeding in court is due process of law, within the meaning of the federal constitution, nor to what extent an officer will be protected in serving a writ of attachment fair on its face, but issued on a fatally defective affidavit, but what is the proper construction to be given our statutes. If it can be said that the cases so cited are in conflict with our views on this question, we are not controlled by them. If a question should arise in the supreme court of the United States as to the law of this state on the subject in hand, that court will follow the decision of this court: *Waples* on Attachment, sec. 630.

It is also urged that because this court in *Blake v. Sherman*, 12 Minn. 305 (420), held that an attachment bond was subject to amendment and correction, on the same principle the affidavit should be held amendable, and consequently not jurisdictional. The contention is not sound. The statutes require a particular ⁴³² form of affidavit to be filed, but do not

require any particular bond to be given. On the other hand, the bond is left in the hands of the officer allowing the writ. Such officer must, on allowing the writ, "require a bond on the part of the plaintiff, with sufficient sureties": Gen. Stats. 1894, sec. 5290. If such officer erroneously decides that a defective bond is sufficient, such erroneous decision does not go to the jurisdiction to allow the writ. The error may be cured by filing a sufficient bond *nunc pro tunc*: See, on this subject, *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142, 80 N. W. 871, 81 N. W. 529. Our conclusion is, that the learned court below should have granted defendant's motion for judgment on the pleadings, and the judgment appealed from is reversed, with directions to do so.

Judgment reversed.

ATTACHMENT AGAINST NONRESIDENTS—AFFIDAVIT—JURISDICTION.—In proceedings by attachment against nonresidents, the affidavit is the foundation of the jurisdiction of the court. It must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ; and its entire omission or the omission of any essential fact therefrom renders all the proceedings *coram non iudice*: See monographic note to *Miller v. White*, 76 Am. St. Rep. 801, on judgments depending for their validity on an attachment of property.

THIBERT v. SUPREME LODGE, KNIGHTS OF HONOR.

[78 Minn. 448, 81 N. W. 220.]

INSURANCE—BENEFICIAL ASSOCIATIONS—CHANGE OF BY-LAWS MUST BE REASONABLE.—The rights of members in benefit insurance associations depend upon the articles of association and the by-laws which have been adopted; and, generally speaking, the body authorized to make by-laws may change, amend, or repeal those already in existence, subject, however, to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and also subject to the implied condition that such change, amendment, or repeal must be reasonable.

INSURANCE—BENEFICIAL ASSOCIATIONS—CHANGE OF BY-LAWS WITHOUT NOTICE—EFFECT OF.—A person who becomes a member of a benefit insurance association may consent to whatever by-laws he may see fit, but a change of by-laws, without his personal knowledge, after he becomes a member may be unreasonable as to him, and of no effect.

INSURANCE—BENEFICIAL ASSOCIATIONS—CHANGE OF BY-LAWS—WHEN UNREASONABLE AND INEFFECTIVE. If a member of a benefit insurance association is entitled, under existing by-laws, to a certain kind of notice of assessments, when he joins the association, as a prerequisite to suspension and conse-

quent loss of rights in the benefit fund, a subsequent change of such by-laws, respecting the method of giving notice, and expressly providing that no failure on the part of the lodge to give notice, or failure to receive it, should relieve members from the penalty of absolute and unqualified suspension, if assessments were not paid, thus virtually depriving the member of all right to any notice, either directly or indirectly, and rendering the giving of notice wholly immaterial, is, as to such member, unreasonable and of no effect, where he is not shown, up to the time of his death, to have had any knowledge of the change, although a newspaper notice of assessments was mailed to him.

INSURANCE — BENEFICIAL ASSOCIATIONS — ACTUAL NOTICE OF ASSESSMENTS—DEFAULT.—If a member of a beneficial insurance association had actual notice of assessments, and promised to pay, but a reasonable time, such as about one month, expired thereafter, before his death, in which to pay, but payment was not made, there can be no recovery on his certificate.

Action to recover on a benefit certificate. A verdict for the plaintiff was directed. The defendant appealed from an order denying its motion for judgment notwithstanding the verdict, but granting its motion for a new trial; and the plaintiff appealed from the order, so far as it granted a new trial.

E. H. Smalley, for the plaintiff.

James O. Pierce, for the defendant.

449 COLLINS, J. Jean Louis Thibert was in his lifetime a member of a subordinate lodge of the Knights of Honor. The defendant is incorporated as the supreme lodge of such Knights, its purpose being to collect and disburse what is known as a "widows' and orphans' benefit fund." The subordinate lodges send delegates to their state lodges annually, and the latter send delegates to the supreme **450** lodge, which also holds annual meetings. The power to alter, amend, and enact by-laws for the collection, control, and disbursement of the fund before mentioned is vested in the supreme lodge, and may be exercised at its annual meetings.

Thibert made application in writing in February, 1892, to become a member of the subordinate lodge at Chippewa Falls, Wisconsin, which was favorably acted upon; and by reason thereof the defendant issued to him a benefit certificate bearing date March 29, 1892, by which defendant agreed to pay out of the fund before referred to the sum of two thousand dollars, upon being furnished satisfactory evidence of Thibert's death, providing he was a member in good standing when his death occurred, and had not been suspended for failing to pay dues and assessments to the fund. A brother was named

as beneficiary. In his application he stipulated that his beneficiary should only be entitled to payment in case he (Thibert) should comply with the laws, rules, and regulations then in force or subsequently enacted; and in the certificate it was provided that payment should be made only upon condition that Thibert complied "with the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government."

Thibert died November 19, 1893, and thereupon the brother assigned the certificate to his widow, the plaintiff, and she brought this action. At the conclusion of the trial, defendant's counsel moved the court to direct a verdict for his client upon all of the evidence. The court denied this motion, and instructed the jury to return a verdict in favor of the plaintiff for the full amount of the certificate, which was done. Upon a settled case, defendant's counsel moved for judgment against plaintiff notwithstanding the verdict, and, if that was denied, then for a new trial; and the appeal is from an order denying the motion for judgment, but ordering a new trial.

When Thibert received his certificate, in 1891, what were known as the by-laws of that year were in force. And there was at all times an officer of defendant known as "supreme reporter." One of the 1891 by-laws provided (section 2 of article 7): ⁴⁵¹ "On the twentieth day of each month the supreme reporter shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered during the ensuing month, shall levy the same, and shall immediately mail notice thereof to each lodge. If the number of assessments so determined be greater or less than two in any month, each member shall be notified thereof at once by the reporter of his lodge, by a notice bearing date of the first day of said ensuing month."

Another by-law was in the following words (section 3, article 7): "Call of Assessments.—On the first day of each month, if it be necessary in order to provide additional funds for the payment of death benefits, a call shall be made upon each lodge for the amount of such assessment or assessments as were made on the first day of the preceding month, on all members upon whom the degree had then or previously been conferred."

There was another (section 7 of article 7) as follows: "Payment of Assessments.—On or before the last day of each month each member shall pay the amount of two assessments, unless the number of assessments due and to be paid during

such month shall have been determined to be greater or less than two, in which event he shall pay the amount of assessments thus determined. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widows' and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order."

While under the head of "Notice of Assessments" (section 6, article 7) was one in this language: "Notice of Assessments.—Subordinate lodges may, at their option, notify members of assessments. But neither the giving of such notice, nor the failure to do so, shall affect the standing of the member in case he fails to pay the assessments as required by section 7 of this article."

From these by-laws it will appear that in 1891, when Thibert obtained his certificate, it was the duty of an officer of defendant, called the "supreme reporter," to determine on the twentieth day of each month the number of assessments which would be needed to provide for and pay death claims duly proven or registered for the coming month, and to levy the assessments so determined, of which ⁴⁵² levy he was to give immediate official notice to each subordinate lodge. This levy was in anticipation of deaths, and evidently the intention was thus to hasten payment of claims. If the assessment was for more or less than two deaths, it was incumbent upon the reporter of each subordinate lodge to give notice, of date the first day of the month in which payment was to be made, to each and every member. It is quite clear, from the fact that this notice was to be dated, that written or printed notice was required. Payment of two assessments on or before the last day of each month was imperatively required of each member, unless the number of assessments had been determined to be greater or less than two. In such case notice was necessary, before the member was in default. If payment was not made, within the month, of any assessment required by the levy, the member so failing to pay stood suspended by operation of law; and from that time, until duly reinstated, his beneficiary was not entitled to participate in the fund we have mentioned. Failure to pay worked the suspension from membership, and suspension, in itself, terminated all claim upon the benefit fund.

We have quoted a by-law upon the subject of "Notice of Assessments." This by-law is, as are nearly all we have examined in this case, somewhat awkward in its construction, and a little

difficult to harmonize with other laws adopted by the supreme lodge. But, as we construe this particular by-law, it referred solely to some rule of a subordinate lodge concerning other or different or additional notice to members, and not to the notice to be given by the reporter of each lodge in case the assessments levied were more or less than two. It authorized the subordinate lodges, at their option, to provide for the giving of notices of all assessments—for notice, for instance, of assessments where but two were levied, no notice of any kind in case of two standing assessments being required by any other by-law. A by-law of the defendant corporation of such value and importance to every member as was that which imperatively imposed upon the reporters of the subordinate lodges the duty of notifying each member of the number of assessments, in case they exceeded or were less than ⁴⁵³ two, should not be wiped out of existence by so crude a provision as the one quoted.

We are therefore of the opinion that when Thibert received his certificate he was entitled to written or printed notice, unless waived, from the reporter of his lodge, in all cases where the assessment was for a greater or less number than two. If, then, the law of 1891 is to govern the case, he was not in default when he failed to pay the amount due for these assessments made by the supreme reporter September 20, 1893, numbered 381, 382, and 383, of which the reporter of his lodge was duly advised, said assessments being payable on or before the last day of October. And as a consequence he was not a suspended member when he died, in November.

But defendant's counsel insists that, in any event, Thibert was suspended because he failed to pay two of the three assessments during October. The argument is that under the by-laws it was incumbent on him to pay the amount of two assessments at or before the last day of each month, and, if he neglected to do this, he stood suspended under all circumstances. But the by-law does not so read, and should not be so construed. In fact, if it were of doubtful construction, it should not be interpreted in aid of an attempt to work a forfeiture. The by-law is that the member shall pay the amount of two assessments each month, unless the number due and to be paid shall have been determined to be a greater or less number than two, and in such case the member shall be notified in accordance with another by-law. The number of assessments determined upon for the month of October was three. The notice was not given, and the by-law, in express terms, pro-

vided the it should be. The defendant cannot escape liability on that ground that, while notice was positively demanded in case the assessments were more or less than two, Thibert should have done something not required of him. There was no by-law which imposed upon him the duty of paying two assessments, without notice, when three had been determined upon, although it is not unlikely that this would have been his duty, without notice, if the number determined upon had been two.

But the principal question on this appeal arises out of the fact ⁴⁵⁴ that in 1893 the by-laws were changed and amended; and it is the contention of defendant's counsel that Thibert was brought within the influence and control of these changes and amendments, because of the agreement that he should be, found in his application to defendant corporation, and because it was stipulated in the certificate on which this action is founded that it is issued upon condition that he complies "with the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government."

It appears that by changes and amendments in 1893 the requirement as to notice by the reporter of each lodge to every member of the number of assessments, in case such assessments were more or less than two, was entirely abrogated, and a new plan adopted; section 2 of article 7 being amended so as to read thus: "On the twentieth day of each month the supreme reporter shall determine and levy the number of assessments, if any, necessary to provide for the payment of benefits on the deaths which may be registered during the coming month; provided, however, that the levy of assessments upon members initiated on or after the first day of July, 1892, shall not exceed one assessment per month during the first six consecutive months, nor two assessments per month during the next eighteen consecutive months, of membership. The supreme reporter shall immediately mail notice of such levy of assessments to the reporter and financial reporter of each subordinate lodge."

And section 3 of the same article was amended so that it read as follows: "Each subordinate lodge may, at its option, provide for notification to its members of the number of assessments thus levied, which may be by written or printed notice, or by newspaper containing the supreme reporter's official notice of such levy, mailed or personally delivered to the members; but no failure on the part of such lodge to give notice to members, or failure to receive such notice, shall operate to relieve from

suspension any member who shall fail to pay the assessments as required by section 7 of this article."

And at the trial the defendants offered to show that after this amendment Thibert's lodge had, under this section, designated a newspaper published in Boston, Massachusetts, as the one in which ⁴⁵⁵ official notices of assessment and levy should be given, and that notice of the October assessments and levy, numbered 381, 382, and 383, was so given, a copy of the paper being mailed to each member of said lodge. The offer was rejected. There was no attempt to prove that Thibert participated in the action of the lodge on this matter, or that he ever knew of it. Section 7 of said article 7, relative to the payment of assessments, was also amended in 1893 so that it read: "On or before the last day of each month each member shall pay the amount of such assessments as shall have been levied. But members initiated after July 1, 1892, shall only pay one assessment per month during the first six consecutive months, and not exceeding two assessments per month during the next eighteen consecutive months, of membership. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widow and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order."

As will have been seen, the effect of these amendments was to substitute new methods of assessment, and of giving notice of the same, as a prerequisite to suspension and consequent loss of rights in the benefit fund. Instead of receiving notice, written or printed, from the reporters of the subordinate lodges, of assessments, in case they exceeded or were less than two each month, lodges, at their option, were authorized to provide for notification by either written or printed notice, or through a designated newspaper, to be mailed or personally delivered to the members; and it was expressly provided that no failure on the part of the lodge to give notice, or failure to receive, should relieve members from the operation of another by-law, which prescribed absolute and unqualified suspension if assessments were not paid within the month. This was a radical and very serious departure from the previously existing by-law. It not only authorized the subordinate lodges, at their option, to do away with written or printed notices of assessments, and to substitute an entirely different method, by causing notice to be published in a designated newspaper; but, in terms, it declared that the failure of a lodge to give, and a failure of a

member to receive, notice, should not operate to relieve members ⁴⁵⁶ from the consequences of an omission to pay. They would stand suspended anyhow. If they neglected to pay all assessments, their rights were gone. No notice was required to work forfeitures, and there was no provision under which members could have a hearing.

It is possible that, as an original by-law, a provision of this character would be held reasonable and operative on the ground that, if persons chose to become members of an association with such drastic rules, theirs was the right so to do. But this was not the by-law when Thibert united with his lodge. The question is not as to the reasonableness of a by-law in force when he cast his fortunes with the order, but it is as to the reasonableness of a change in a by-law after he became a member, and of which it was not shown that he had any personal knowledge. In fact, it has been held that provisions for forfeitures in the original by-laws of mutual benefit societies, without providing for notice, or giving an opportunity to be heard, are void because unreasonable: 1 Bacon on Benefit Societies, sec. 85, and cases cited. But if the proposition that such a sweeping change as that attempted by defendant in 1893 as to notice of assessments can be upheld, and the rights, which have become vested and valuable, of those who have previously become members, be taken away through such a forfeiture, these associations should no longer be called benevolent, for they may easily become oppressive. They may cease to be of pecuniary service to those who, because of the death of the wage-earner of the family, need aid and assistance, and become nothing but a trap into which members may pay their assessments for years, and at last have everything confiscated through the action of the law-making body.

The rights of members in these associations must, of course, depend upon the articles or by-laws, to which all members assent when becoming such; and, generally speaking, the same body which is authorized to make by-laws can change, amend, or repeal those already made; and to this Thibert agreed when he joined. But changes, amendments, and repeals are subject to the restrictions and limitations of the by-laws themselves, as well as those of the charter or articles of association, and are also subject to the implied condition of being reasonable: 1 Bacon on Benefit Societies, sec. 91a, and citations. The amendments and changes in 1893 took away the ⁴⁵⁷ right which members had under the laws of 1891, to notice of monthly assess-

ments, should they exceed or be less than two, and imposed upon each member the duty of taking notice himself of the number. He could not even pay two assessments, in the absence of notice, and protect himself. It conferred upon each subordinate lodge the power to provide, at its option, for notice to each member, and then wiped out the effect and benefit of an exercise of this power by declaring that a failure to give the notice agreed upon should not operate to relieve a member from his positive obligation to pay. If a member received the notice, and did not pay, he stood suspended, and had forfeited his rights, unless reinstated. If he did not receive the notice, and failed to pay, he was in the same predicament. The value of the publication of such a notice in a newspaper, except to its publisher, is not strikingly apparent.

We are compelled to hold that a change or amendment to the by-law in force when Thibert entered the association, whereby it was incumbent upon the reporter of his lodge to give him notice of assessments, if for a greater or less number than two, which deprived him of all right to any notice, either directly or indirectly, by means of a provision rendering a failure to give notice as determined upon by his lodge wholly immaterial, was a vitally important change, and, as to him, unreasonable and void. Nor is the reasonableness or unreasonableness of this change affected by the fact, if it was a fact, that his lodge had designated a newspaper in which notices were to be published, and copies mailed to each member. This was a radical and unreasonable change in the method of giving notice, which, according to the previously existing rule, was to be given by the lodge reporter. We are quite confident that no member who had been receiving and relying upon this form of notice would suppose, upon receiving such a paper, that this method of notifying had been substituted for the other.

But it does not follow that Thibert was not in default, and a suspended member, when he died. At the trial the reporter of his lodge testified that he met Thibert at Chippewa Falls about the middle of October, and then and there personally notified him of the assessment and levy in question, and also that the amount thereof ⁴⁵⁸ must be paid on or before the last day of that month, and further testified that Thibert then promised to pay said amount before he left the town to go into the woods, where he had employment. The law-making body of this defendant corporation had wiped out the by-law under which notice had previously been required and had been given, so that

it was no longer to be followed. And probably it would have had the power to substitute in place thereof the kind of notice which was given, if the testimony of the reporter was entitled to credit. Such a substituted by-law would, we think, have been reasonable and operative as to all members. So, if the lodge reporter was truthful, Thibert had actual notice of the three assessments.

A majority of the court are of the opinion that this notice, if given, and he accepted it as sufficient by promising to pay, was sufficient, and also that he would have a reasonable time thereafter within which to pay. If the notice was actually given, and about the middle of the month, as testified to by the witness, a reasonable time had certainly elapsed before his death on November 19th. If this notice was given to Thibert, his widow could not recover upon this certificate, for he stood suspended at the time of his death. The writer takes occasion to say that he does not assent to the proposition that the reporter, or any other officer of the subordinate lodge or of the defendant corporation, could put Thibert in default by any other kind of notice than that required by the law of 1891. If the amendments of 1893 were unreasonable, and consequently of no effect as to Thibert, he could not, in the opinion of the writer, be put in default by verbal notice. He continued to be entitled to the notice provided for by the 1891 by-law, for as to him that law remained in force. But, in any event, the question whether the reporter gave the notice testified to was for the jury, taking into consideration, as we must, that Thibert, who alone could deny the conversation, was dead, and could not be heard. We must not be understood as saying that, in all cases where one of the parties to a conversation is deceased, the truthfulness of a version of the living as to what was said between them is for the jury. But in this case we think it was.

There is nothing whatsoever in the claim of counsel for plaintiff ⁴⁵⁹ that the effect of the payment by Gregoire, the day before Thibert died, was to reinstate him.

The order stands affirmed.

It is further ordered that plaintiff's appeal from that part of the order of July 11, 1899, which set aside the verdict and granted a new trial, be, and hereby is, dismissed.

MUTUAL BENEFIT ASSOCIATIONS—CHANGE OF RULES.—The rules of beneficial associations are binding on their members: Note to Kearns v. Howley, 68 Am. St. Rep. 859; and the contract of insurance between a mutual benefit society and one of its members is made up of the application for membership, the certificate

issued, and the charter, constitution, and by-laws of the order: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 559, discussing the law of such societies. A benefit society may, of course, change its rules, and if the association expressly reserves the power to amend and the member makes himself subject to whatever change the association may make in the contract, he is bound by the rules "now in force or which may hereafter be enacted": Note to *Fullenwider v. Supreme Council*, 72 Am. St. Rep. 244. But a by-law must be reasonable, and a contract between a member and the association cannot be enlarged or changed except by the consent of both contracting parties: Note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557, 558. While a mutual benefit society has the power to make, alter, abrogate, or amend its by-laws, it cannot so exercise this right that it will operate as a repudiation of its obligations, or to work a forfeiture of rights previously vested in its members: Note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556.

STATE v. ZENO.

[79 Minn. 80, 81 N. W. 748.]

CONSTITUTIONAL LAW—REGULATION OF TRADE OR PROFESSION.—In the exercise of the police power in the interest of public health and welfare, it is competent for the state legislature to enact a law prohibiting persons from practicing the calling of a barber without first obtaining a license or certificate of registration.

A. H. Hall and C. J. Cahaley, for the appellant.

F. Healy and H. D. Dickinson, for the respondent.

82 BROWN, J. Defendant was convicted in the municipal court of the city of Minneapolis of a violation of the Laws of 1897, chapter 186, and appeals from an order denying his motion for a new trial.

Defendant is a barber, and has followed that occupation since 1880—most of the time in this state. At the time of the violation of the law in question he was located and engaged in such calling at the city of Minneapolis. On April 1, 1899, he performed certain acts within his calling upon the persons of John Madden and Rudolph Scholl, without first having obtained a license as required by such law; and for this he was convicted, and sentenced to pay a fine. There is no controversy about the facts. Defendant violated the law by continuing in his occu-

pation without a license, and was properly convicted, unless it be held that the law is unconstitutional and void. The sections of the law applicable to this case are as follows: "Section 1. It shall be unlawful for any person to follow the occupation of barber in this state unless he shall have first obtained a certificate of registration as provided in this act; provided, however, that nothing in this act contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided."

Section 2 et seq. provide for a board of examiners, and prescribe their duties. Section 7 provides that persons engaged in the occupation of barbers in this state at the time of the approval of the act shall be entitled to license certificates upon the payment of a fee of one dollar, and filing with the secretary of the board an affidavit of residence, etc. "Sec. 8. Any person desiring to obtain a certificate of registration under this act shall make application to said board therefor and shall pay to the treasurer of said board an examination fee of five dollars, and shall present himself at the next regular meeting of the board for the examination of applicants, whereupon said board ⁸³ shall proceed to examine such person, and being satisfied that he is above the age of nineteen (19) years, of good moral character, free from contagious or infectious diseases, has either (a) studied the trade for three (3) years as an apprentice under a qualified and practicing barber, or (b) studied the trade for at least three (3) years in a properly appointed and conducted barber school under the instructions of a competent barber, or (c) practiced the trade in another state for at least three (3) years, and is possessed of the requisite skill in said trade to properly perform all the duties thereof, including his ability in the preparation of the tools, shaving, hair-cutting and all the duties and services incident thereto, and is possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade, his name shall be entered by the board in the register hereafter provided for, and a certificate of registration shall be issued to him. . . .

"Sec. 14. Any person practicing the occupation of barber without having obtained a certificate of registration, as provided by this act, . . . is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine," etc.

The question as to the constitutionality of this statute is the only one involved in the case. Counsel for defendant as-

sail the statute from all directions, and urge its invalidity on several grounds, but we need consider the points made by them only so far as they are pertinent to the statute as applied to this particular case. We will not stop to inquire whether it would be within the power of the legislature to limit the number of apprentices a barber should be permitted to have at one and the same time. Such question has no bearing upon the one now before us. It will be time enough to consider and determine it when it is presented in some case where that particular violation is complained of. The question in this case is, Is it competent for the legislature to prohibit persons from practicing the calling of a barber without first obtaining a license or certificate of registration?

Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals are everywhere upheld and sustained. Such laws are within the police power of the state, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such ⁸⁴ laws is called in question is no longer the power or authority of the legislature to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public health and interests. A person engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents and others inimical to the public good. It is unnecessary to discuss the grounds upon which such laws are upheld, or the objections urged against them. Counsel for defendant ably present their side of the question, but the authorities are all against them. We cite, as pertinent to the question, *State v. State Med. etc. Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State v. Board Med. etc.*, 34 Minn. 387, 26 N. W. 123; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *People v. Warden*, 144 N. Y. 529, 39 N. E. 686; *Singer v. State*, 72 Md. 464, 19 Atl. 1044; *Dent v. West Virginia*, 129 U. S. 114, 121, 9 Sup. Ct. Rep. 231.

Is the occupation of a barber a calling or trade involving to any degree the public health and public good? If it is, the law must be sustained. We hold that it is, and that the health of

the citizen and protection from diseases spread from barber shops conducted by unclean and incompetent barbers fully justify the law. It is a fact of which we must take notice that the people of to-day come in contact with, and engage the services of, those following the occupation of barber, as much as, if not more than, any other occupation or profession. We must take notice of the fact, too, that the interests of the public health require and demand that persons following that occupation be reasonably familiar with, and favorably inclined toward, ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops, caused, no doubt, by uncleanness or the incompetency of barbers. We must take notice of the fact that to attain proficiency and competency as a barber requires training, study, and experience—training in the art, and study and experience in the management and conduct of the calling. A design and purpose to protect the public from injurious results ⁸⁵ likely to follow from such conditions is the foundation of statutes like this. And as we must take judicial notice of the foregoing facts, the foundation for this law is apparent. And it may be said, further, that there is as much reason for a law of this kind as to barbers as there is for such a law as to dentists, pharmacists, lawyers, and plumbers. It is enacted in the interests of the public health and welfare, and we sustain it.

The contention of appellant that if the law is sustained he will be unable to continue in his business, because he cannot now obtain a license, is not sound. He was a barber engaged in the occupation at the time of the approval of the law, but he failed to make application for a license under the terms of section 7, above quoted, within ninety days, or at all; and his contention is that, because he does not come within either of the three classes of applicants specified in section 8, he cannot obtain a license at all. This statute, like all statutes enacted in the interests of the public welfare, is entitled to a broad and liberal construction, and one that will give force and effect to the intention of the law-making power. Applying such a construction, we hold that a person who has followed the occupation of a barber for three years in this state, and is otherwise possessed of the necessary qualifications, is entitled to a certificate of registration, the same as a person coming into the state from another state. There was no intention to discriminate against barbers of this state and in favor of those residing in

other states, and a construction of the law which would result in such discrimination cannot be permitted.

This disposes of all questions deserving special mention.

Order affirmed.

LICENSE.—THE CONSTITUTIONALITY OF STATUTES prescribing a license as a prerequisite to following a calling or business is discussed in *State v. State etc. Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516; monographic notes to *People v. Naglee*, 52 Am. Dec. 331-335; *State v. Long*, 59 Am. Rep. 267-282.

O'BRIEN v. MANWARING.

[79 Minn. 86, 81 N. W. 746.]

JUDGMENTS—RES JUDICATA.—If a material fact, decisive of the case, is tendered as an issue and not withdrawn, a determination thereon adversely to the party tendering it is conclusive against him in a subsequent suit involving the same issue, whether he introduced evidence in the former action in support of such issue or not.

J. N. Castle, for the appellant.

McLaughlin & Boyesen, for the respondent.

⁸⁶ **LOVELY, J.** The plaintiff brings this action to recover a sum of money which he claims should be returned to him by the assignee of an insolvent estate, who has received the same, but, as is claimed, in equity and good conscience should be repaid.

Manwaring, the assignee of McLaughlin & Kilty, in a former action considered by this court (75 Minn. 542, 78 N. W. 1) recovered of this plaintiff the possession of a stock of boots and shoes transferred to him before assignment by the insolvents. The recovery, upon the issues in that case, may have been accorded by the jury under the instructions of the court, for the reason that the sale from McLaughlin & Kilty to O'Brien, the plaintiff, was fraudulent, or because of his want of care in certaining the previous condition of ⁸⁷ the insolvents; and he now brings this suit upon the theory that he bought the stock of merchandise in good faith, and that the defendant assignee, having received the goods, should not have them, and the money paid for them also, which it is alleged had been

turned over by the insolvents to the assignee. This last allegation is contested by the assignee, but was not in this action determined by the court below, who held that upon the issues in the former action, fully pleaded in this, the supposed grievance of plaintiff had been fully determined, and became res judicata upon the very claim which plaintiff seeks to establish in this suit.

It may be conceded for the purposes of this review that appellant's complaint sets forth a cause of action which would entitle him to recover from the assignee the money which he paid for the stock of goods in question. But it also appears from the answer in the former action, duly pleaded in this, that the good faith of this very payment was an issue duly tendered by this plaintiff, which was or might have been litigated in that action. Paragraph 11 of the answer in the former suit makes reference to this issue in the following words: "That the transaction between this defendant [plaintiff here] and said McLaughlin & Kilty was a cash one, and the purchase price was paid at the time of said purchase in the usual way by the check, . . . which said check was fully paid, . . . which fact the plaintiff [respondent here] . . . well knew, . . . [and] that said sum, to wit, twelve thousand five hundred dollars, was duly turned over and delivered to plaintiff herein."

That this was a part of the answer in the first suit, and that issue was joined upon it, followed by judgment, was admitted before the trial court and conceded upon this appeal. In our view, these concessions conclude the appellant, and forbid further litigation of the rights of the parties concerning the subject. Whether the appellant introduced any evidence to support this allegation on the former trial, which he denies, is immaterial. He might have done so, and is concluded by the result as effectively as if he had: *Thompson v. Myrick*, 24 Minn. 4; *Long v. Webb*, 24 Minn. 380; *Geiser etc. Co. v. Farmer*, 27 Minn. 428, 8 N. W. 141; *Drea v. Cariveau*, 28 Minn. 280, 9 N. W. 802; *Goldschmidt v. County of* ^{ss} *Nobles*, 37 Minn. 49, 33 N. W. 544; *Pierro v. St. Paul etc. Ry. Co.*, 39 Minn. 451, 12 Am. St. Rep. 673, 40 N. W. 520; *Ebert v. Long*, 43 Minn. 235, 45 N. W. 226. The issue thus tendered in the former action involving the payment of this money in good faith by appellant, and received by assignee, is not only the identical cause of action set up for recovery in the complaint in this suit, but it was a material issue therein, and of itself decisive of the case, for the assignee could not keep the money, as alleged in the

answer in the former case, without affirming the sale. In other words, if what was alleged was established in the first case, it was a complete defense independent of any other question therein: *Hathaway v. Brown*, 22 Minn. 214. Such issue was not withdrawn. Hence, in the former decision it must have been determined adversely to the appellant here, and all controversy upon it is closed by the former decision.

The order of the district court dismissing the cause is affirmed.

RES JUDICATA.—If a plaintiff alleged several facts, the proof of any of which would have entitled him to a recovery, and there was a general finding against him, it must be presumed conclusively in another action between the same parties upon the same facts that each fact averred was determined, whether any evidence in support thereof was offered or not: *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493.

CORCORAN v. SUMPTION.

[79 Minn. 108, 81 N. W. 761.]

PARTNERSHIP—ACTION TO DISSOLVE—PLEADING.—

If an action is commenced by one partner against another to dissolve a partnership created for a term of years on the ground of misconduct of the partner in respect to the partnership business, it is not essential that the latter allege in his answer the commencement of such action, and that he has thereby been damaged in order that he may avail himself of the wrong and injury done him in commencing the action.

PARTNERSHIP—PURCHASE OF INTEREST—CONSIDERATION.—If a member of a partnership created for a term of years has paid a premium for an interest therein, the consideration for such payment is not only the creation of the partnership, but also its continuance for the term agreed upon.

PARTNERSHIP—DISSOLUTION—DAMAGES.—If a partner to whom a premium has been paid for an interest in a partnership is guilty of misconduct bringing about a dissolution of the partnership before the end of the term for which it was formed, the premium may be apportioned, and a part thereof returned, and the amount thereof may be determined and awarded as damages in an action to dissolve the partnership.

L. D. Barnard, for the appellant.

M. H. Albin, for the respondent.

¹⁰⁹ COLLINS, J. Plaintiff and defendant entered into co-partnership November 1, 1894, for the practice of dentistry in

the city of St. Paul, the partnership to continue for five years, defendant paying plaintiff three thousand dollars for a half interest in the business theretofore conducted by him. November 14, 1895, plaintiff commenced this action, alleging in his complaint gross misbehavior and misconduct on the part of defendant in respect to the partnership business, and that in several specified ways he had violated the copartnership agreement. The firm indebtedness was alleged to be about seven hundred dollars, while the assets, it was stated, were insufficient to meet and liquidate the same. The relief demanded was the appointment of a receiver to wind up the business, and also that a dissolution be adjudged. The court below refused to appoint a receiver pending the litigation.

The answer admitted the partnership, the payment of three thousand dollars by defendant, and that the firm indebtedness was about seven hundred dollars. It denied the allegations of the complaint as to defendant's misbehavior or misconduct, or that he had violated the agreement. And as a counterclaim defendant averred full, proper, and perfect performance and compliance on his part in every respect, and a willingness to contribute his share of the amount of money required to meet and pay all firm indebtedness. It set forth certain false and fraudulent statements and representations on plaintiff's part, made for the purpose, and which induced defendant to pay said three thousand dollars and to enter into said copartnership. It alleged various acts of misconduct on plaintiff's part in respect to copartnership duties and obligations, and that in a number of particularly specified ways he had violated and disregarded the agreement. It set forth in ¹¹⁰ detail the amount of business transacted by the firm prior to the commencement of the action, the expense incurred, the amount of profits for the time which had elapsed—about one year—and the estimated profits for the remainder of the five year term. The relief demanded did not particularly differ from that asked by plaintiff.

An agreement was then entered into between the parties under which the firm assets were sold, the debts paid, and the surplus divided, the defendant receiving the sum of six hundred dollars. The pendency of the action was recited in the agreement, but it was expressly stipulated: "That this agreement shall in no way affect the status of the hereinbefore mentioned action brought by said Corcoran against said Sumption, or in any way affect the right of either party to the relief asked for by either of the parties to said action in their respective

pleadings, except as herein settled or adjusted, but that either of said parties to said suit shall have the same right to recover in said action, or in any other action, for damages and only damages as he may be able to show himself entitled by reason of the breaches of said partnership agreement by either of said copartners, whether as alleged in said pleadings or otherwise, or on account of any other facts that may be hereafter set up or alleged in any subsequent pleadings in said action, or in any other action by or against either party to this agreement, or against said copartnership, the same as and as fully as if this agreement had not been entered into, for breaches of said articles of copartnership and on account of the misconduct of either of said copartners in the conduct of said partnership matters."

The reply, made subsequently, alleged this agreement, a copy thereof being attached. Some months afterward the cause was brought on for trial before the court without a jury, whereupon plaintiff's counsel announced that plaintiff had abandoned his cause of action, and would not introduce evidence to support it. Witnesses were then called and testimony received in defendant's behalf. During the trial the court ruled that for the purposes of the case as it then stood the copartnership was dissolved by the bringing of this action, and that by the subsequent agreement made by the parties the only question for consideration was whether defendant was entitled to recover on account of the matters set forth ¹¹¹ in his counterclaim. In this connection the court expressly stated that, if defendant was guilty of some wrong which furnished good cause for bringing this action, he could not recover damages. There was no exception taken to this ruling, and both parties seem to have acquiesced in it, and to have subsequently tried their case with reference thereto. Among the facts found by the court was the following: "That the defendant also upon his part faithfully performed all the other duties and obligations by him to be performed under said agreement and partnership, and was able, ready, and willing to continue said partnership according to said agreement until prevented by the conduct of the plaintiff as hereinafter found." And further: "That on November 14, 1895, the plaintiff above named wrongfully and without cause began this action against the defendant, praying for a dissolution of said partnership, the appointment of a receiver to close up its business, and for other relief, and thereby and thereafter refused to continue said partnership any longer."

There was no finding that defendant was prevented from performing on his part by any act or behavior of plaintiff, except as above set forth; or that the latter had violated the terms of the copartnership agreement in any other manner than by bringing this action. Counsel for plaintiff argues that the trial court erred when making these quoted findings of fact, and also erred when it made its conclusions of law based upon them.

The position taken by counsel is that, as it was nowhere averred in the answer that defendant had suffered any damages whatsoever on account of the commencement of this action, there could be no such damages recovered; or, to state it differently, that, as defendant's counterclaim and alleged right to recover was predicated wholly upon allegations in the answer of misbehavior and misconduct prior to the commencement of this action, there could be no recovery on findings which were not responsive, and failed to cover such allegations.

It was not necessary for the answer to contain the averments contended for by counsel. The bringing of the action with a complaint charging defendant with a gross violation of his contract stood as a stubborn fact, and it would be an absurdity to hold that ¹¹² defendant must plead it when answering. Defendant's counterclaim was founded on plaintiff's misbehavior and misconduct and disregard of duty as a copartner, the bringing of the action willfully and without good cause being one of the wrongful acts and the culmination thereof. The court so held when, on the trial, it ruled, as before stated, that the action itself terminated the partnership, to which no exception was taken. More than this, the parties had covered this identical point when they stipulated in the agreement that either party should recover such damages as he might be entitled to, "whether as alleged in the pleadings or otherwise." The plaintiff declined to substantiate the charges found in his complaint, thus virtually admitting that the present action was unfounded and unjust, and he ought not to find fault with the findings referred to. As was said by the learned trial court, plaintiff should not "complain if held responsible for the necessary and logical consequences of his own deliberate acts." The findings were certainly within the issues, and abundantly warranted the conclusions of law, if the proper measure of damages was adopted.

In addition to ordering judgment formally dissolving the copartnership, the court awarded damages to defendant in the sum of two thousand four hundred dollars, and as to this plain-

tiff's counsel assigns error. By this award the plaintiff was permitted to retain one-fifth of the amount paid, the other four-fifths being restored to defendant; this because the copartnership had been dissolved when one-fifth of the agreed term had expired, the plaintiff being wholly responsible therefor. He obtained from defendant a premium for a copartnership agreement extending over a period of five years. At the end of the first year he compelled and brought about a dissolution willfully, and without a just motive, and without a reasonable cause. He could not thereby free himself from his obligations, but must be held responsible for the wrong. The answer was founded on the theory that the damages recoverable would be a sum equivalent to the prospective profits for the four years yet within the life of the agreement, but the trial court proceeded to assess damages on a different basis; that is, on the basis of the premium paid by defendant to plaintiff. The court was right unquestionably. A distinguished writer says: ¹¹³ "The consideration for the premium is not only the creation of a partnership between the person who takes, and him who parts with, the money, but also the continuance of that partnership; and if a person on his entry into a partnership pays a premium and then the partnership is determined sooner than was expected, the question arises whether any, and if any what, part of the premium ought to be returned." And also: "Disagreements between the partners resulting in a dissolution have given rise to much difficulty. The tendency of modern decisions is to apportion the premium in these cases not only where neither partner is to blame, but a fortiori where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved; and it matters not that the latter may himself not be altogether free from blame; nor is the rule altered by the fact that the partners have consented to dissolve since the institution of legal proceedings." And again: "There is no definite rule for deciding in any particular case the amount which ought to be returned. The time for which the partnership was entered into, and the time for which it has in fact lasted, are the most important matters to be considered; but other circumstances must often be taken into account in order to decide what is fair between the parties. At the same time the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership": 1 Lindley on Partnership, 2d ed., 65-69.

The same rule is laid down in 2 Bates on Partnership, section 805, and to sustain the order appealed from we are not required to indorse all that is said in these text-books. It is enough for us to adopt and to announce as sound and just the rule that, if the partner to whom the premium is paid is guilty of misbehavior and misconduct which compels and brings about a dissolution during the time for which the partnership was formed, the premiums may be apportioned, and a part returned; the amount thereof to be determined and awarded as damages in the action to dissolve.

Order affirmed.

PARTNERSHIP.—DISSOLUTION of partnerships is treated in the monographic notes to *Breaux v. Le Blanc*, 69 Am. St. Rep. 410-436; *Slemmer's Appeal*, 98 Am. Dec. 260-271; *Gilmore v. Ham*, 40 Am. St. Rep. 561-576. A partner dissolving the partnership with unfair designs is liable to his copartners for damages suffered thereby: *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376.

ERTZ v. PRODUCE EXCHANGE OF MINNEAPOLIS.

[79 Minn. 140, 81 N. W. 737.]

CONSPIRACY—BOYCOTTING.—A complaint alleging that plaintiff had a profitable business, and that defendants conspired to refuse to deal with him, and to induce others not to deal with him, whereby his business has been ruined, states a cause of action for damages, if it appears that such interference with his business did not serve any legitimate purpose, but was done maliciously to injure him.

Stiles & Stiles, for the appellants.

J. Robertson and M. C. Brady, for the respondent.

142 **START, C. J.** The defendants interposed a general demurrer to the complaint in this case, and they appealed from the order of the district court of the county of Hennepin overruling their demurrer. The material facts alleged in the complaint are these:

The plaintiff is now, and for two and a half years past has been, engaged at the city of Minneapolis in the business of a commission merchant, buying and selling farm produce and commodities. His profits from his business, prior to the committing of the wrongs hereinafter stated by the defendants, were twenty thousand dollars per year. To enable him to conduct

his business, it has been and is necessary for him to buy such farm produce and commodities in the market at Minneapolis, and resell the same to his customers. The defendants, during the time the plaintiff has so conducted his business, have been, and still are, engaged in buying and selling farm produce and commodities, and they are practically all the persons, firms, and corporations who are engaged in such business in the city of Minneapolis, and during such time they did and still do control, regulate, and govern the quantity and price of such farm produce and commodities, and the purchase and sale thereof. The plaintiff, prior to July 19, 1899, was accustomed to and did purchase the produce and commodities so dealt in by him from the defendants, and paid them therefor in full. But on the day named, and at various subsequent times, the defendant the produce exchange conspired, confederated, and agreed to and with all of the other defendants herein not to sell to or buy of plaintiff, in any manner, any farm produce or commodities for the purpose of carrying on his business. The defendant the produce exchange then and there did maliciously solicit and procure from all of its codefendants, and each of them, and from many other persons to the ¹⁴³ plaintiff unknown, an agreement not to sell to or buy from plaintiff such products and commodities, and did so induce its codefendants, and each of them, and other persons, by the aid of, and through the influence of, all of the defendants, not to sell to or buy of the plaintiff any of such products and commodities, for the purpose of his business or otherwise. In pursuance of such conspiracy each and all of the defendants have, with such malicious and unlawful intent, ever since July 19, 1899, refused so to sell to or buy of the plaintiff, and have daily circulated among and reported to the patrons of the plaintiff that he was unable to buy, such products and commodities, with the intent of inducing such patrons to discontinue doing business with the plaintiff. The business of the plaintiff, by reason of the premises, has been ruined, and he has been damaged thereby in the sum of twenty-five thousand dollars.

If the allegations of the complaint are true, and the demurrer admits them, it is certain that the plaintiff has suffered material financial injury by the acts of the defendants. Does the law afford him any remedy? Counsel for the defendants insist that the question must be answered in the negative, because their acts in the premises were lawful, and, being so, the intent with which they did the acts is immaterial. It may be

conceded that, if the acts of the defendants were lawful, the motive which actuated them is immaterial in determining the strict legal rights of the parties. The question, then, is, Were the defendants' acts legal? In its broadest aspect, this question involves considerations of the highest importance to the individual and to the public. The genius of our free institutions encourages all men to seek better fortunes, higher levels, and larger opportunities for success in life. Therefore, within proper limits, it is both lawful and commendable for men to combine for the purpose of securing better wages or larger returns from their business ventures. It is not, however, our purpose to enter upon any general discussion as to the limitations upon this right of men to combine for the purpose of furthering their own interests, without reference to the rights of others. Our sole purpose is to inquire whether the acts of the defendants in this case were, as to the plaintiff, lawful.

¹⁴⁴ The defendants rely upon the case of Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, in support of their contention that the defendants' acts in question were lawful. The general propositions of law laid down in the decision in that case are sound, as applied to the facts of that particular case, which were substantially these: The defendants were retail lumber dealers, and formed a voluntary association, by which they mutually agreed that they would not deal with any wholesale dealer who should sell lumber to persons not dealers at the place where a member of the association was carrying on business. The object of the association was to protect its members against sales by wholesale dealers to contractors and consumers. In case a wholesale dealer made any such sale, and refused to make amends therefor, as provided by the by-laws of the association, its secretary was required to notify all of its members of the fact, and thereafter such members were to refrain from dealing with the offending wholesale dealer. The plaintiff, the Bohn Manufacturing Company, a wholesale dealer, having made such a sale, the secretary of the association was about to send notice of the fact to all of its members. Thereupon the company commenced an action for a permanent injunction, enjoining the defendants from issuing such notices. This court held that the action would not lie. The decision was correct, but it is not applicable to the alleged facts in this case.

It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect, which were menaced by

the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried ¹⁴⁵ into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful.

It is true, as claimed by the defendants and as stated in the Bohn case, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men as he sees fit, and that the right which one man may exercise singly many may lawfully agree to do jointly by voluntary association, provided they do not interfere with the legal rights of others. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him: See *Walker v. Cronin*, 107 Mass. 555, 562; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Graham v. St. Charles etc. R. R. Co.*, 47 La. Ann. 214, 49 Am. St. Rep. 366, 16 South. 806; *Hopkins v. Oxley etc. Co.*, 83 Fed. 912, 49 U. S. App. 709. This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action.

Order affirmed.

BOYCOTTING.—The right of a person to refuse to have business relations with another, whether the refusal is based upon reason or is the result of caprice, prejudice, or malice, must be limited to the individual action of the party asserting the right. It is not equally true that one person may from such motives influence another to do the same thing: *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111. Compare *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119. An act maliciously done with the intent and purpose of injuring another is not law-

ful competition: *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924. Generally speaking, no one has a right intentionally to do an act with the intent to injure another in his business: *Macauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1.

McNEAL v. RIDER.

[79 Minn. 153, 81 N. W. 830.]

COTENANCY—CROPPING CONTRACT.—Under a contract for the cultivation of a farm on shares providing that the land owner reserves the cropper's share of the crop, as security for advances made by him, the parties to the contract are, until division, tenants in common of the crop.

CHATTEL MORTGAGES—CROPPING CONTRACTS.—A contract for the cultivation of a farm on shares providing that the land owner reserves the title to the cropper's share of the crop raised for advances made by him is in effect a chattel mortgage, in so far as it is security for such advances and, to be valid against subsequent mortgagees, purchasers, or attaching creditors, must be filed for record as provided by statute.

Calhoun & Bennett and J. H. Rhodes, for the appellants.

G. W. Stewart, for the respondent.

154 *BROWN, J.* This is an action in claim and delivery for the possession of certain wheat, of the value of one hundred and thirty-three dollars and fifteen cents. It was tried by the court without a jury. Plaintiff had judgment, and defendants appeal from an order denying a new trial.

On March 27, 1897, one Milbury was the owner of the tract of land on which the wheat in controversy was raised, and entered into a contract with one Lutes, under which Lutes undertook and agreed to cultivate and farm the land for a share of the crops. This contract is in the form of, and substantially similar to, those considered and construed in *Wright v. Larson*, 51 Minn. 321, 38 Am. St. Rep. 504, 53 N. W. 712, *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617, *Anderson v. Liston*, 69 Minn. 82, 72 N. W. 52, and *Avery v. Stewart*, 75 Minn. 106, 77 N. W. 560. Under and by its terms, Lutes agreed to till and farm the land in a good and farmerlike manner during the season of 1897, to furnish at his proper cost and expense all proper and convenient tools and machinery necessary to carry on and cultivate the farm, to furnish and provide all proper assistance and hired help, to protect the fences and shade trees,

and to cultivate the land in the best possible manner, and, as soon as the crops were removed, to replot the land and put it in suitable condition for the succeeding year's crop, and further, "Not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, of any kind, character, or description, until the division thereof, without the written consent of party of second part; and, until such division, the title and possession of all hay, grain, crops, and produce raised, grown, or ¹⁵⁵ produced on said premises shall be and remain in party of second part, and said party of second part has the right to take and hold enough of the crops that would on the division of said crops belong to party of the first part to repay any and all advances made to him by party of the second part, and interest thereon at ten per cent per annum, and also to pay all indebtedness due said party of second part by said party of first part, if any there be. It is also agreed that, in case said party of the first part neglects or fails to perform any of the conditions and terms of this contract on his part to be done and performed, then said party of the second part is hereby authorized and empowered to enter upon said premises and take full and absolute possession of the same; and he may do and perform all things agreed to be done by party of the first part remaining undone, and to retain or sell sufficient of the crops raised on said premises that would otherwise belong to said first party if he had performed the conditions thereof, to pay and satisfy all costs and expenses of every kind incurred in performing said contract, with interest at ten per cent per annum, and the residue remaining, if any, of said crops, shall belong to said party of first part after all conditions hereof are fulfilled."

This contract was duly assigned by Milbury to the plaintiff on September 14, 1897, but was never filed in the office of the town clerk of the town in which the farm is located, or elsewhere. The plaintiff claims that certain advances were made to Lutes, under the terms of the contract, to the amount of one hundred and thirty-three dollars and fifteen cents, which have never been paid; and she bases her claim to the wheat under and by virtue of the provisions of the contract giving her the right to take and hold enough of Lutes' share of the crops to secure and pay all advances made to him. On September 7, 1897, for a valuable consideration, and in the ordinary and usual course of business, said Lutes made and executed a chattel mortgage upon his share of the crop of wheat so

raised under such contract to one Wilson, to secure the payment of a promissory note for the sum of one hundred and eighty-three dollars and twenty-nine cents. This mortgage was duly filed, and was sold and transferred to defendant Bouck on October 13, 1897. This defendant claims title to the wheat under this mortgage, and another not necessary to mention; and defendants Rider and Morrill justify as sheriff and deputy sheriff, and under a writ of attachment issued against Lutes in favor of defendant Bouck.

There is no controversy as to the facts. Plaintiff asserts title to the wheat under her farm contract, and defendants assert title ¹⁵⁶ and right to the possession thereof under the Wilson mortgage and the writ of attachment. There is no question as to the validity and good faith of the Wilson mortgage, and as there can be no serious doubt but that the appeal from the order vacating the writ of attachment revived and continued the writ in force until such appeal was dismissed, the case narrows down to the question whether the contract under which plaintiff claims the wheat is in effect a chattel mortgage, at least in so far as it gives her the right to hold Lutes' share of the crops raised thereunder as security for advances made to him, and whether to be valid as against subsequent mortgagees and attaching creditors, it should have been filed in the proper town clerk's office. If it was necessary to file such contract, to give it validity and priority over subsequent creditors and mortgagees, the rights of the defendants are superior to plaintiff's, and they should have judgment, because the contract was not filed. The answer does not allege a transfer of the Wilson mortgage to defendant Bouck, but the mortgage and the assignment thereof were received in evidence, and are before the court, and must be considered, even though they were duly objected to by plaintiff.

A proper disposition of the case renders necessary a consideration of the questions (1) as to the respective rights and interests of the parties to a contract like that under consideration in and to the crops raised thereunder; and (2) the legal effect of that portion of the contract giving the land owner the right to take and hold enough of the cropper's share of the crops to secure the repayment of advances made to him. Whatever may be the law in other states on this subject, we regard both questions as definitely settled in this state by the decisions of this court in the Strangeway, Anderson, Avery, and Wright cases, *supra*.

1. If it can be said that the contract construed and considered in the case of *Porter v. Chandler*, 27 Minn. 301, 38 Am. Rep. 293, 7 N. W. 142, is similar in substance and effect to that involved in those cases, the *Porter* case has been very quietly overruled. In the *Porter* case it was held that the contract there involved was just what it purported to be—a contract of hiring, that the absolute ownership of the crops raised thereunder belonged to the land owner, and that ¹⁵⁷ the cropper or hired man had no interest therein which was subject to levy on execution. The controversy in that case was between the cropper and one of his creditors.

In the *Strangeway* and *Anderson* cases a doctrine quite contrary to this is expressly laid down. It is distinctly held in those cases that, until a division of the crops, the parties are tenants in common, with the right of the land owner to hold enough of the crops which would on a division belong to the cropper as surety for advances made, and as further security, as held in the *Avery* case, that the cropper will not wrongfully dispose of the land owner's share. Those cases do not hold that the land owner is the absolute owner of the crops, as is held in the *Porter* case, but, on the contrary, expressly lay down the rule that until a division the parties are tenants in common of all crops raised. This is a distinct departure from the *Porter* case, and in effect, though not expressly, overrules it. But an examination of the contract considered in the *Porter* case will show that there are substantial differences between it and the contracts involved in the later cases. The contract in the *Porter* case starts out as follows: "That the said A. L. Porter, party of the first part, upon the terms and conditions hereinafter specified, hereby hires and employs the aforesaid Henry Linnemann to work, till, and carry on the following described farm."

Neither this language nor its equivalent is found in the contracts considered in the later cases. It also provides for tilling and farming the land by the cropper in a good, farmerlike manner, and, when the grain raised thereon is threshed, that the cropper will deliver the same, and the whole thereof, to the land owner's granary. And "it is further agreed and distinctly understood by and between the parties to these presents that all the grain, corn, straw, grass, hay, and all other crops and produce of every kind that shall grow or be raised on said farm during the year or season of 1877, shall be the property of the said A. L. Porter, and that all of the said farm land and prem-

ises, and every part and parcel thereof, shall be and remain in the possession of the said A. L. Porter, and under his absolute control and supervision, and all the work and labor to be done on said farm during said term shall be done thereon by ¹⁵⁸ the said Henry Linnemann and A. Linnemann according and agreeably to the orders and directions of the said A. L. Porter, and under his direct supervision; and it is further agreed and mutually understood by and between the parties to these presents that in case the parties of the second part shall fail to do the work in the manner and at the time and times herein specified, or fail to perform and fulfill any of the terms and conditions of this agreement, then and in that case they shall forfeit all claims under this agreement, and the said A. L. Porter shall have the right to have, hold, and retain full possession of the said farm and premises, and to complete the work necessary to be done in said premises."

There is no provision in that contract by which the parties agree that "until a division" the crops belong to the land owner. There is no provision that, in case of default in the performance of the contract by the croppers, the land owner shall have the right to enter upon the farm and complete the work, and deduct the expense thereof from the cropper's share of the crops, as in the Strangeway and Anderson cases. But there is a provision that in case of such default the croppers forfeit all rights under the contract.

The contracts involved in the Strangeway and other late cases expressly recognize the right of the cropper to a share of the crop, and provide for a division thereof; but no such recognition is to be found in the Porter contract, nor does it contain a stipulation as to a division at all. For these reasons, we think the contracts are fairly distinguishable. But, if they are not, it is beyond question that the later cases in effect overrule the Porter case. In the Porter case the land owner is held to be the absolute owner of the crops, with no right or interest in the cropper, while in the later cases it is distinctly held that the land owner and cropper are tenants in common. It is not important what a contract may be named or called by the parties. The real intention as expressed in the writing must control. And, as said by this court in the Strangeway case, contracts of this character must be so construed as to give force and effect to the intention of the parties. Under such a construction there is no room for controversy but that the

later decisions of this court are correct, and in harmony with the general trend of the later authorities outside the state.

¹⁵⁹ 2. Is the contract, in so far as it reserves the title to the crops in the land owner, and the right to take and hold enough of the cropper's share to repay advances made to him, a chattel mortgage? We think this question has also been definitely settled and determined by the decisions of this court.

There can be no question of the right of a tenant in common to mortgage or otherwise sell or dispose of his interest in the common property: *Potts v. Newell*, 22 Minn. 561. And if he may sell or mortgage his interest, the same may be reached on execution or attachment. The question whether a contract like that here involved is in effect a chattel mortgage came squarely before this court in *Wright v. Larson*, 51 Minn. 322, 38 Am. St. Rep. 504, 53 N. W. 712; and it was there distinctly held that in so far as it created a lien, and reserved in the land owner the ownership of the crops, and the right to take and hold the cropper's share as security for the payment of advances and indebtedness due from him, it was in legal effect a chattel mortgage, and void as to subsequent mortgagees and purchasers in good faith, unless filed. The case of *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, 33 N. W. 117, is very similar to this one. It is there held that a clause in a lease of real estate reserving to the lessor a lien for the rent on the goods and chattels of the lessee placed on the demised premises is in its nature and effect a chattel mortgage, at least in equity, and should be filed. Gilfillan, C. J., speaking for the court in that case, said, at page 85: "A chattel mortgage is a transfer of the title as security, and strictly, at law, must contain words of conveyance. But so strongly are courts inclined to so construe the agreements of parties as to make them effectual, that no formal words of transfer, and no particular form of instrument, are required to make an agreement operate as a mortgage."

In *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617, this court said, at page 395: "The provision that until division the title and possession should be and remain in the plaintiff, if given the effects claimed for it by him, would be as repugnant to both the letter and spirit of the other provisions in the contract as would be a provision that defendant should have no right to enter upon the premises at all, and ¹⁶⁰ that if he did so, he would be a trespasser. The only effect that can be given to that provision consistent with the general purpose, as well

as the other express provisions of the contract, is that plaintiff should have the title, and, when necessary, the right to the possession, of the crops, as security for the performance of the terms of the contract by the defendant. Any other construction would nullify the entire contract, and render impossible its performance by the defendant."

In the case of *Anderson v. Liston*, 69 Minn. 82, 72 N. W. 52, this court sums up the law on this subject as follows, at page 84: "So far as it was security for 'advances' and 'indebtedness,' it may be conceded, as the law probably is, that the contract was in effect a chattel mortgage, and was required to be filed, as to subsequent bona fide purchasers and as to creditors."

It is contended that the precise question was not presented in, or necessary to a decision of, that case; but the question was squarely presented in the *Wright and Merrill* cases, *supra*, and squarely decided, and the *Anderson* case is but a statement of the law as there established and laid down. To sustain the position of respondent, we must overrule all these cases, and return to, resurrect, and reannounce as the law the rule laid down in the *Porter* case. The nature of the questions will not warrant us in doing so. The lawyers generally have acted on these decisions, accepted them as the law of the state, and proper respect for consistency requires that we adhere to them.

We have gone somewhat extensively into the questions, for the reason that we are not fully agreed as to the nature and extent of former decisions of the court. We have considered and examined all the cases that have come to our notice wherein similar contracts have been involved, and the conclusion reached is in conformity with the law as previously declared by this court. The result is that, as plaintiff's farm contract under which she claims the wheat was not filed, she has no right to the wheat as against the defendants.

Order reversed.

MR. JUSTICE COLLINS dissented and said: "The land owner may easily protect himself as to present indebtedness and future advances by filing his contract in the proper office, and were this the only effect of the prevailing opinion in this case, I should not dissent. But there is a question deeper and of more consequence than this, which is foreclosed by the conclusion that such a contract is nothing more than a chattel mortgage, and must be filed as such; and it is this question which influences me to think the result altogether wrong. Nor can I agree with the majority in the assertion that such a contract is in effect a chattel mortgage, and must

be filed. Nor, so far as I have observed, has that been the prevailing opinion among the members of the bar. At the risk of repetition, let me refer to the decisions on which the claim is based that the primary question has already been determined, namely: *Porter v. Chandler*, 27 Minn. 301, 38 Am. Rep. 293, 7 N. W. 142; *Wright v. Larson*, 51 Minn. 321, 38 Am. St. Rep. 504, 53 N. W. 712; *Strangeway v. Eisenman*, 68 Minn. 395, 71 N. W. 617; *Avery v. Stewart*, 75 Minn. 106, 77 N. W. 560. . . . It is well settled, taking the cases specially referred to as a whole, that, as between themselves, the parties to a contract containing the provisions found in the one now presented are tenants in common of the crop prior to a division, each having certain rights therein. The cropper is entitled to such possession and control as will enable him properly to perform the required labor, and this is the extent of his right. He may till, cultivate, harvest, and thresh as he has agreed and is obliged to do, but he has nothing which he can sell or dispose of. If this be so, I fail to see how his mortgage can become effective, or by what authority his share in the crops can be seized at the instance of a creditor, until there has been an actual division.

“There is some diversity of opinion in other jurisdictions over this question. In a majority of the courts of last resort it is held that where it is agreed in the contract that the legal title and possession of the crops shall remain in the owner of the land until the other party has fully performed, and there has been a division, the reservation or contract does not operate as a mortgage or mere security to the owner. The legal possession of the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper is limited, and for a special, necessary purpose. Such possession is merely incident to his right and duty to plant, till, cultivate, and gather, and for these purposes only to control the soil and crops: 4 Am. & Eng. Ency. of Law, 895, and cases cited; 8 Am. & Eng. Ency. of Law, 2d ed., 323-325, and citations. And there seems to be no difference of opinion in the courts wherein croppers and land owners are not regarded as tenants in common for all purposes: 4 Am. & Eng. Ency. of Law, 899, and cases cited in notes. . . .

“But I said at the outset that it was not important what we held on the abstract proposition, and that if it were not for a question of greater significance and consequence I should not dissent. I refer to what must be the inevitable result of the conclusion reached, namely, that as it is held that such a contract is nothing more than a chattel mortgage, the land owner is powerless to prevent a sale by the cropper, or a seizure of the crop by a mortgagee, or officer of the law acting in behalf of a creditor, as soon as the seed is in the ground, and the substitution, through such seizure, of a new cropper in lieu of the one he has selected. The person with whom the owner has contracted, perhaps for personal fitness and ability, would then be excluded from the premises, and the self-substituted

cropper remain in control. This is the logic of the decision. The basis thereof is that the land owner and the cropper are tenants in common. If so, the latter may sell or encumber, or a creditor may act through an officer; for, as stated in the prevailing opinion, citing *Potts v. Newell*, 22 Minn. 561: 'There can be no question of a right of a tenant in common to mortgage or otherwise sell or dispose of his interest in the common property.' I think this court should hesitate long—whether the decision is rested upon the ground of *stare decisis* or on some other doctrine—before holding that the contract of the man who owns the land, and presumptively is the owner of a crop growing thereon, and a cropper whom he has selected to till and cultivate the same, shall be thrust aside, that a purchaser or a mortgagee or a sheriff may step into the cropper's shoes and carry on the land. That is just what was done here. Before the grain was stacked the sheriff took possession, excluded the cropper, defied the owner, stacked and threshed the grain, dividing it at his leisure and as he willed. It is not to be forgotten that the land owner cannot protect himself from such an outrage by filing his contract. Filing will not prevent a seizure of the crop and the dispossession of the cropper if a mortgagee or a creditor chooses to annoy either or both of the parties. Nor is this all. If the contract be filed, a subsequent mortgagee may, under the doctrine of the *Anderson* case, limit the credit to be given under such contract, and stop all future advances, by giving the land owner actual notice of his mortgage. The owner is then placed between the mortgagee, who gives him notice, and the cropper, who can have very little further interest in the crop; the result to be expected being an abandonment of the crop and the contract by the latter.

"For the reasons stated, and the very serious consequences which it seems to me will flow from the conclusion reached by the majority, I dissent. I am authorized to say that Chief Justice Start concurs in these views."

COTENANCY.—AN AGREEMENT TO CROP land on shares constitutes the parties thereto tenants in common of the crop until a division of it is effected: See the monographic note to *Putnam v. Wise*, 37 Am. Dec. 317, 322.

CHATTEL MORTGAGE.—FOR A CROPPING CONTRACT, in effect a chattel mortgage, see *Wright v. Larson*, 51 Minn. 321, 38 Am. St. Rep. 504, 53 N. W. 712.

DREW v. TIFFT.

[79 Minn. 175, 81 N. W. 839.]

CONSTITUTIONAL LAW—INHERITANCE TAX.—A constitutional provision requiring equality of taxation as near as may be, applies to inheritance taxes exactly as it does to taxes on property, except as may be otherwise expressly provided in such constitution.

CONSTITUTIONAL LAW—INHERITANCE TAX.—A statute which attempts to lay an inheritance tax, excluding from its operation real property and laying the tax upon inheritances of personalty, exempting from its operation persons and corporations whose property is exempt from taxation, allowing a larger exemption to lineal than to collateral heirs, and not taxing the excess of the value of the property received above a uniform exempted sum, is unconstitutional and void under a constitution requiring equality of taxation as near as may be.

Haynes & Chase, Ripley & Brennan, Cross, Hicks, Carleton & Cross, and Keith, Evans, Thompson & Fairchild, for the appellant.

W. B. Douglas, attorney general, and F. R. Allen, county attorney, for the respondent.

¹⁸⁰ **START, C. J.** This is an appeal by the plaintiff from the order of the district court of the county of McLeod denying his petition for a peremptory writ of mandamus requiring the probate court of that county ¹⁸¹ to proceed with the distribution of the estate of George Drew, deceased, without requiring the payment of an inheritance tax, as provided by the Laws of 1897, chapter 293. The sole question for our decision is the constitutionality of such inheritance tax law.

We are relieved from the necessity of discussing the power of the legislature to enact a law taxing all inheritances, or the propriety of exercising such power, for it is unanimously conceded (as it must be) by counsel that such a law, if uniform and equal, without discrimination, would be constitutional, wise, and wholesome. Legacy and inheritance taxes are not of modern origin. They were imposed by the Roman civil law, and in England as early as 1780. They are now in force generally in the countries of Europe. Pennsylvania imposed such taxes by a statute enacted as early as 1826, and similar statutes are now in force in many of the other states of the Union. They have, as a rule, been held to be constitutional by state and federal courts: *Dos Passos on Inheritance Tax*, c. 1. But

Minnesota is, so far as we are advised, the only state whose constitution in express terms limits the power of the legislature in the laying of an inheritance tax. Therefore, the precise question in this case is whether the act in question conforms to the limitations of our state constitution. Such being the case, it necessarily follows that the large number of judicial decisions in other jurisdictions, cited by counsel in this case, although interesting and helpful as illustrating the history of inheritance tax statutes and the general principles upon which they have been sustained, are not directly in point.

The here material provisions of our constitution are these: "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state; provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements; . . . and provided, further, that there may be by law levied and collected a tax upon all inheritances, devises, bequests, legacies and gifts of every kind and description above a fixed and specified sum, of any and all natural persons and corporations. Such tax above such exempted sum may be uniform, or it may be graded or progressive, but shall not exceed a maximum of five per cent": Const., art. 9, sec. 1.

¹⁸² This proviso as to an inheritance tax was added in 1894 as an amendment to section 1, article 9, and is to be construed as a part thereof, precisely as if the original section and the proviso had been adopted at the same time, as a complete statement of the fundamental law upon the subject of taxes, including those upon inheritances. In order to determine intelligently whether the inheritance tax act of 1897 violates any of the provisions of this section, it is first necessary to ascertain its meaning.

The power of taxation by the state, except as limited by constitutional provisions, is practically unlimited; hence this section must be construed, not as a grant of the power of taxation, but as a limitation upon the exercise of the power: Cooley's Constitutional Limitations, 105, 593. So construing it, its meaning is obvious, and it stands as a barrier against legislative invasion of the reserved rights of the individual as to the manner of imposing taxes upon him for the support of the state. Its keynote is that "all taxes to be raised in this state shall be as nearly equal as may be." Counsel for respondent, however,

claim that this limitation, as originally adopted, applies only to taxes on property. If this be so, then the power of the legislature to lay unequal and arbitrary impost and excise taxes was left unrestricted. Such a construction is contrary to the spirit of the constitution, its clear and direct language, and the trend of all of the decisions of this court on the question: *Stinson v. Smith*, 8 Minn. 326 (366); *Sanborn v. Commissioners etc.*, 9 Minn. 258 (273); *Faribault v. Misener*, 20 Minn. 347 (396); *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *State v. Gorman*, 40 Minn. 232, 41 N. W. 948.

It is true that all of these cases involved only questions as to taxes or assessments on property, but the rationale of the opinion in each case leads directly to the conclusion that all taxes, whether on property or in the form of excise and impost taxes, must, under this constitutional mandate, be laid as nearly equal as practicable. The case of *State v. Gorman*, 40 Minn. 232, 41 N. W. 948, has been understood and cited as an authority that the requirement of our constitution that all taxes to be raised in this state shall be as nearly equal as may be applies to excise and impost taxes, and therefore a statute laying an inheritance tax would be unconstitutional: See *Magoun v. Illinois* ¹⁸³ etc. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594. In the *Gorman* case it was held that the Laws of 1885, chapter 103, requiring, as a condition precedent to probate proceedings for the settlement of estates in probate court, the payment to the county treasury of specified sums arbitrarily prescribed with reference to the value of the estate, was unconstitutional, because it violated the constitutional requirement of equality of taxation. It is not quite clear whether this decision was based upon the proposition that the tax was one laid upon property or upon the privilege of having estates settled and distributed in the probate court. If the former—which was probably the case—the decision is not an authority for or against the right of the legislature to levy an inheritance tax under section 1, article 9, of the constitution. If the word “taxes,” as used in this section as it originally stood, includes excise and impost taxes, it by no means follows that a statute laying an inheritance tax, which aimed at practical equality, would not be valid.

Again, the decisions of this court with reference to statutes and ordinances imposing license fees upon auctioneers, draymen, hackmen, peddlers, persons dealing in intoxicating liquors, and others engaged in occupations of a character bringing them within the police power of the state, are based upon the proposi-

tion that the constitutional mandate that all taxes to be raised must be as nearly equal as may be includes excise and impost taxes. Such statutes have been sustained only upon the ground that the enactment was a proper exercise of the police power, and in every case where it was apparent that the license law was enacted with a view to revenue, and not as a police regulation, it has been held void, when the constitutional requirement of equality of taxation was disregarded: *Rochester v. Upman*, 19 Minn. 78 (108); *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *Duluth v. Marsh*, 71 Minn. 248, 73 N. W. 962; *State v. Finch*, 78 Minn. 118, 80 N. W. 856.

If, however, there is any doubt as to the proposition that under the original provisions of section 1, article 9, of the constitution, any statute laying an inheritance tax which ignored the fundamental principle of equality of taxation would have been invalid, ¹⁸⁴ the doubt is set at rest by the proviso to the section adopted as an amendment thereto in 1894. The necessary effect of this proviso was to subject the power of the legislature to lay an inheritance tax to the original limitation that all taxes to be raised in this state must be as nearly equal as may be, for, as already suggested, the section in question, as it now reads, must be construed precisely as if the proviso had been a part of the original section; hence the mandate of equality qualifies the provisions of the amendment, and applies to the whole section: *Noonan v. Stillwater*, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444. We therefore hold that by virtue of section 1, article 9, of our state constitution, as it now stands, the requirement of equality in taxation applies to inheritance taxes exactly as it does to taxes on property, except as expressly provided in the last proviso thereto. In reaching this conclusion we have not overlooked the fact that it is contrary to the great weight of authority in other states. But our constitution in this particular is unique, and its mandate is so clearly expressed as to leave no doubt as to its meaning; hence, the decisions of the courts of other states are not in point.

Now, it is apparent from the mere reading of the proviso as to an inheritance tax in connection with the requirement of equality of taxation that any statute providing for an inheritance tax must lay the tax upon "all inheritances, devises, bequests, legacies, and gifts of every kind and description," including those of real property as well as personal. There can be no discrimination in this respect. Therefore, any statute lay-

ing a tax upon all bequests and gifts of personal property and exempting inheritances, devises, and gifts of real property would be void, for the reason that it would violate the constitutional mandate of equality of taxation, and the limitations of the proviso, which declares, in legal effect, that if the legislature decides to lay an inheritance tax it must be upon all bequests, devises, and gifts, without exempting any. It is equally clear, and for the same reason, that such a statute must lay the tax upon all bequests, devises, and gifts to "any and all natural persons and corporations." If any person or corporation is exempted from the burden, the statute is void. It might be ¹⁸⁵ otherwise if the tax were one on property, and not on the privilege of receiving the property.

Again, the amendment provides that the tax may be laid upon all devises, bequests, and gifts "above a fixed and specified sum," and that "such tax above such exempted sum may be uniform or it may be graded or progressive, but shall not exceed a maximum tax of five per cent." These particular provisions are exceptions to the rule of equality in taxation, enforced by the general terms of the section. They authorize the exemption of devises, bequests, and gifts to the extent of a fixed and uniform sum, from the operation of the tax, and the laying of the tax only upon the excess of such devises, bequests, and gifts. The exemption, however, must be uniform, and apply equally to all persons and corporations, for it is only the tax above a fixed and specified sum which may be uniform, graded, or progressive, in the discretion of the legislature. This last proviso is a distinct departure from the rule of equality, as near as may be, in the laying of taxes, for it expressly provides that the tax may be graded or progressive. This authorizes the legislature, in its discretion, to graduate the tax by increasing the percentage of the tax, within the maximum limit of five per cent, as the value of the property to be received increases, or as the relationship to the deceased of those who are to receive the property is more remote.

We come now to the question whether the inheritance tax law of 1897 violates any of the provisions of section 1, article 9, of the constitution, as we have construed it. The title of the statute is, "An act for a tax on gifts, inheritances, devises, bequests, and legacies in certain cases," and its here material provisions are these:

"Section 1. A tax shall be and is hereby imposed upon the transfer of any personal property, of the value of five thousand

(5,000) dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, not exempt by law from taxation on real or personal property, in the following cases. . . . Such tax shall be at the rate of five (5) per centum upon the clear market value of such property, except as otherwise prescribed in the next section.

“Sec. 2. When the property or any beneficial interest therein ¹⁸⁶ passes by any such transfer to or for the use of father, mother, husband, wife, child, brother, sister, wife, or widow of a son, or the husband of a daughter, or any children adopted as such, in conformity with the laws of this state, of the decedent, grantor, donor, or vendor; or to any person to whom such decedent, grantor, donor, or vendor for not less than ten (10) years prior to such transfer stood in the mutually acknowledged relation of a parent, or to any lineal descendant of such decedent, grantor, donor, or vendor, born in lawful wedlock, such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand (10,000) dollars or more, in which case it shall be taxable under this act at the rate of one (1) per centum upon the clear market value of such property.”

It may be conceded, as claimed by counsel for respondent, that the tax attempted to be levied by this statute is not upon the property received by the beneficiary, but upon the privilege of receiving it. The statute, however, was enacted, by virtue of the legislative power of taxation, solely with a view to revenue, and the burden it seeks to impose is a tax within the meaning of the constitution. The first objection to the statute to be considered is the claim that, in so far as it attempts to tax lineal heirs (we use the term to designate the class referred to in the statute) and distributees at the rate of one per cent of the value of the property and collateral heirs (that is, those not expressly named in the statute) at a higher rate (five per cent) it is unequal taxation, and therefore unconstitutional. There is a natural reason for taxing the privilege of the latter of receiving the property at a higher rate than that of the former, and, as we have already decided, the proviso in question authorizes such graduation of the tax. Hence, the statute is not unconstitutional for this reason.

It is further claimed that the statute is void because it allows a larger exemption to lineals (ten thousand dollars) than to collaterals (five thousand dollars). It is unconstitutional for this reason, for, as already stated, the constitution authorizes only one

uniform exemption to all persons and corporations. Again, it is urged that the statute is invalid because it lays the tax upon the entire devise, bequest, or distributive share, if of the specified value, and not upon the excess above a fixed specified exempted sum, as the amendment requires. The gross inequality of the statute in this respect is manifest. Thus, ¹⁸⁷ by its terms, a tax on a legacy to a collateral heir of five thousand dollars would net the beneficiary, after deducting the tax thereon (two hundred and fifty dollars), only four thousand seven hundred and fifty dollars, while a legacy of four thousand nine hundred and ninety-nine dollars would be exempt from the tax, and would give the beneficiary two hundred and forty-nine dollars more than would the larger legacy. The constitution authorizes the laying of the tax only upon the excess above the exempted sum, and the statute violates the constitution in this respect. It is also contended on behalf of the appellant that the statute is unconstitutional because it exempts from the tax all persons and corporations whose property is exempt by law from taxation. It is invalid for this reason, for the constitution expressly provides for a tax "upon all inheritances, . . . of every kind and description," to "all natural persons and corporations." The statute is unconstitutional for the further reason that it exempts from its operation all devises, bequests, and transfers by intestate laws of real property, and lays the tax only upon those of personal property. This is forbidden by the constitution.

In holding this statute unconstitutional for the reasons stated, we have not overlooked the fact that it is substantially a copy of the inheritance tax law of the state of New York (except that the latter applies to both real and personal property), which has been sustained by the courts of last resort of that state and by the supreme court of the United States. But this is immaterial, for the constitution of the state of New York contains no limitations and restrictions upon the exercise of the power of taxation by the legislature similar to those of our own constitution which we have considered. This difference in the constitutions of the two states seems to have been lost sight of in the adoption of the New York statute in this state, and explains why a statute which violates our constitution in so many particulars was enacted.

It follows that the order appealed from must be reversed, and the cause remanded, with directions to the district court to grant the writ of mandamus prayed for. So ordered.

A SUCCESSION TAX MUST BE UNIFORM as to persons of the same class: *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245; *Estate of Cope*, 191 Pa. St. 1, 71 Am. St. Rep. 749, 43 Pac. 79.

THE CONSTITUTIONALITY OF INHERITANCE TAXES is considered in *State v. Hamlin*, 86 Me. 495, 30 Pac. 76, 41 Am. St. Rep. 569, and the note thereto, pages 580-585.

CROOKSTON v. BOARD OF COUNTY COMMISSIONERS.

[79 Minn. 283, 82 N. W. 586.]

CONSTITUTIONAL LAW—TITLE OF STATUTE.—The generality of the title of a statute constitutes no constitutional objection to its validity, if such title is sufficient to give notice of the general subject of the proposed legislation and of the interests likely to be affected.

CONSTITUTIONAL LAW—TITLE OF STATUTE.—A statute creating a municipal corporation, and granting to it legislative, judicial, police, taxing, and other ordinary powers, embraces but one subject, and the separate provisions of the act covering these powers generally, as well as in detail, are simply parts of the whole, and absolutely essential to make a whole. The details of such powers are not required to be set forth in the title of the act.

A. R. Holston and A. A. Miller, for the appellant.

L. E. Gossman, city attorney, and De F. Bucklen, for the respondent.

284 COLLINS, J. This is an action to recover the amount of certain interest and penalties alleged to have been collected by the county treasurer on account of taxes which have been levied for city purposes on property within the limits of plaintiff city for a series of years prior to and including 1899, and also interest which the county has received, it is claimed, on account of the amount so collected, from county depositaries. The right of the city to recover is predicated upon an act of the legislature entitled "An act to amend and consolidate the charter of the city of Crookston," now found as Special Laws 1885, chapter 1. The particular sections in question are in subchapter 5, entitled "Finances," and are numbered 15 and 16. Section 15 provides for the transmission by the city council to the county auditor, and, on or before October 1st of each year, of a statement of all taxes levied by such council for city purposes, which taxes are to be collected and payment is to be enforced with, and in the same manner as are, state and county

taxes; that is, by the ²⁸⁵ same officials and in the same way. Subchapter 5, section 16, is as follows: "The county treasurer of Polk county shall pay over such taxes, together with all interest and penalties which shall be collected on account of the same when collected, to the treasurer of said city in the several settlements of the funds to be so paid over, as provided by general law. Said county treasurer shall account for and pay over to the city treasurer such portions of the interest paid by banks with whom funds of said county are deposited as have accrued upon funds arising from city taxes and assessments so deposited with such county funds or parts thereof."

By a general demurrer to the complaint, the defendant's counsel deny the right of the plaintiff to recover from the county, in whose treasury the money has been retained; their contention being: 1. That the above-quoted express and unambiguous provisions as to payment by the county treasurer to the city treasurer of all interest and penalties which shall have been collected on account of city taxes, and all interest thereon which has been paid by county depositaries, are of no validity, for certain specified reasons; and 2. That because of its title the act contravenes the provisions of article 4, section 27, of the state constitution, which requires that "no law shall embrace more than one subject, which shall be expressed in its title."

1. There is not a particle of merit in the first proposition, and to discuss it is really a waste of time. There is no conflict between the charter provisions under consideration and those contained in the General Statutes of 1894, sections 1599, 1601, 1602, 1605, 1613. And, if there was, it would not follow that the former, instead of the latter, would be invalid. But when property is sold to a purchaser at a delinquent tax sale, as provided in section 1599, or when after it has been bid in by the state for want of a purchaser (section 1592), and the right of the state has been assigned, as authorized in section 1601, the city taxes and the penalties and interest, if any, have been collected, and the municipality is entitled to receive the money. Subsequent payments to the county treasurer in redemption or otherwise do not concern the city, and none of the serious results to purchasers at the tax sales, or to holders of certificates of assignments, mentioned by counsel for the defendant, can follow.

²⁸⁶ 2. We have repeatedly considered the constitutional provision relied on, and nothing of value can be added to the cases found in our reports upon this particular subject. The title of the act clearly expresses its subject, which is a consolidated

and amended charter for the plaintiff city, and in the act we should naturally expect to find such provisions as might be necessary for the proper government of a municipality. Among the most important of these expected provisions would be one relating to taxation, and no single provision of a charter could be more germane to its subject, as expressed in the title, than one relating to the finances of the city. And when providing for finances we might anticipate that the legislature would arrange the details found in sections 15 and 16, for these details are strictly within the scope of the enactment. More than this, not only should the city receive such penalties and interest as may accrue on account of delinquent taxes assessed and levied for its own use, but an examination of a large number of charter enactments in this state has disclosed the fact that the provision in section 16 on which this action is founded is so common as to be practically universal. A provision of this character has a just and proper reference to the subject of a municipal charter expressed in the title of the act, and is manifestly appropriate in that connection. The generality of the title is no objection, if it be sufficient to give notice of the general subject of the proposed legislation, and of the interests likely to be affected. So it has been held repeatedly that an act creating a municipal corporation, and granting to it legislative, judicial, police, taxing, and other ordinary powers, embraces but one subject; the separate provisions of the act covering these powers generally, as well as in detail, being simply parts of the whole, and absolutely essential to make a whole. To sum it all up, in the language of counsel for respondent: "It is certainly germane to the subject of incorporating a city, and to the subject of amending and consolidating the charter of a city, to provide for the details of the management of the affairs of the city, and to find named the agencies or channels through which it might act, and the method of raising money by taxation, and for the payment of the same by the county authorities to the ²⁸⁷ city. The details of these transactions are not required to be set forth in the title of the act." As bearing upon this case, see *St. Paul v. Colter*, 12 Minn. 16 (41), 90 Am. Dec. 278; *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382, 50 N. W. 923; *State v. Anderson*, 63 Minn. 208, 65 N. W. 265; *Putnam v. St. Paul*, 75 Minn. 514, 78 N. W. 90.

Order affirmed.

TITLE OF STATUTE.—THE GENERALITY of the title to a statute is not objectionable, but the provisions of the statute must all be germane to the general subject expressed: See the monographic note to *Bobel v. People*, 64 Am. St. Rep. 70-107; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990.

THE TITLE OF AN ACT RELATING TO MUNICIPAL CORPORATIONS is sufficient if the subject is indicated in the title and the provisions of the act are germane to the subject expressed: See the monographic note to *Bobel v. People*, 64 Am. St. Rep. 102, 103.

When does the Title of a Statute Embrace but One Subject, and What may be Included Thereunder?

Effect of Statute Containing More than One Subject.—Many of the state constitutions contain the general declaration that each statute must embrace but one subject, which shall be expressed in its title. These provisions are usually made mandatory. Hence, a statute which does not comply with them must be void either in whole or in part. If it contains and its title expresses two or more subjects, it is manifest that the whole must be void, for it cannot be known which the legislature would have preferred to omit had it known both could not be included in the same statute: *Ballentyne v. Wickersham*, 75 Ala. 533; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454. If, however, the act contains two or more subjects, one of which is expressed in its title, these constitutions usually provide, and we apprehend that such would be their construction without any direct provision on the subject, that it is void only as to subjects not embraced in the title: *State v. Read*, 49 La. Ann. 1535, 22 South. 761; *McPherson v. Blacker*, 92 Mich. 377, 31 Am. St. Rep. 587, 52 N. W. 469; *State v. County Commrs.*, 47 Neb. 428, 66 N. W. 434; *Bohmer v. Haffen*, 161 N. Y. 390, 55 N. E. 1047; *State v. Nowland*, 3 N. Dak. 427, 44 Am. St. Rep. 572, 57 N. W. 85; *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930; *Martin v. South Salem Ins. Co.*, 94 Va. 28, 37, 26 S. E. 591. In the note to *Bobel v. People*, 64 Am. St. Rep. 70-107, we considered at length the sufficiency of the titles to statutes, and we shall here avoid as much as possible any reconsideration or restatement of the matters there considered. The constitutional provisions here under consideration create much doubt respecting the subjects which may properly be grouped together in one valid enactment, and tend, where not properly understood, to the treatment by the legislature in several statutes of the details or subdivisions of general subjects which might better be included in a single act, and, on the other hand, to distressing and needless anxiety on the part of the public lest necessary legislation be deemed void, because the manifold details of a single subject are included, as they should be, in a single statute. Hence, we believe it will be profitable to consider somewhat in detail what is a single subject or object within the meaning of the constitutional provisions here in question, both with respect to original statutes and to subsequent amendments thereof.

Doubts are Resolved in Favor of a Statute.—In determining what statutes follow the constitutional provision here under consideration, no doubt the general rule is applicable, that the courts will not pronounce a statute unconstitutional unless it is clearly so, and both the statutes and the constitutional provisions with which they are claimed to be in conflict will be liberally construed with the view of sustaining legislative action, and hence a statute will not be declared void as containing two or more subjects if all the alleged subjects may properly be regarded as details of a general and comprehensive subject sufficiently expressed in the title, and all the provisions of the statute are germane to such general subject: *Bobel v. People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322; *Ex parte Mayor etc.*, 116 Ala. 189, 22 South. 454; *Larned v. Tiernan*, 110 Ill. 173; *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 340; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990; *Tabor v. State*, 34 Tex. Cr. Rep. 631, 53 Am. St. Rep. 726, 31 S. W. 662.

Comprehensiveness of Subject is not Prohibited.—The most important rule to be remembered in connection with these constitutional provisions is, that they do not contain any limitations upon the comprehensiveness of the subject of any single statute, and, therefore, if the title chosen for an act is sufficient to point out any general subject or topic, the details thereof, however numerous, may be legislated upon therein: *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Abeel v. Clark*, 84 Cal. 229, 24 Pac. 383; *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492; *Commissioners etc. v. Jacksonville*, 36 Fla. 196, 18 South. 339; *Johnson v. People*, 83 Ill. 431; *Fuller v. People*, 92 Ill. 182, *McChesney v. Chicago*, 159 Ill. 223, 42 N. E. 894; *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765; *In re Hegne-Hendrum D. Co.*, No. 1 (Minn.), 82 N. W. 1094; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 798, 24 S. E. 930. That this rule is maintained practically without dissent will be shown from the following quotations from the opinions of the courts: "The exigencies of legislation require that this provision shall not be so literally construed as to cripple the legislature, by prohibiting the insertion into laws of those matters which, though they may not be specifically expressed in the title, are proper to the full accomplishment of the object so expressed. Such is presumed to have been the intention of the authors. Courts, therefore, give it a liberal construction. The insertion in a law of matters which may not be verbally indicated by the title, if suggested by it, or connected with, or proper to the more full accomplishment of the object so indicated, is held to be in accordance with its spirit": *Ballentyne v. Wickersham*, 75 Ala. 533; *City Council v. National etc. Assn.*, 108 Ala. 336, 18 South. 816. "As we have said, the generality of the subject expressed in the title is no objection to it, since it is purely a matter of legislative discretion whether the subject expressed shall be general or specific. And it is clear that the broader and more general the sub-

ject, the greater the number of particulars or subordinate subjects which will be embraced within it. Thus, to illustrate, if the title of an act should be, 'An act to define and punish the crime of larceny,' it is clear that provisions defining perjury, arson, or felonious homicide, and fixing the punishment of those offenses, would be subjects wholly foreign to the title of the act. But if the title should be, as is the case with our present Criminal Code, 'An act to revise the law in relation to criminal jurisprudence,' the subject thus expressed would clearly be broad enough to include provisions defining and fixing punishment, not only of these but of all other imaginable offenses against the public law, and also all proper provisions for the prevention of crimes, for the indictment, trial, conviction, and punishment of all classes of offenders, and for fixing the jurisdiction, both original and appellate, of the various courts in criminal cases, and prescribing the mode of procedure and the rules of evidence applicable to criminal trials. These subjects, multiplied as they are in detail, are all included in the general subject of criminal jurisprudence, and if the title of our Criminal Code, in expressing the subject of the act, had added to the words, 'to revise the law in relation to criminal jurisprudence,' as follows: 'And to define and punish larceny, perjury, arson,' etc., inserting a catalogue of every distinct species of crime known to the law, there would still have been but one subject expressed": *People v. Nelson*, 133 Ill. 565, 27 N. E. 217. "If all the provisions of the act relate to one subject, which is indicated in its title, and the parts of the act are incident to and reasonably connected with, the subject indicated, and are reasonably auxiliary thereto, then the act may include details of legislation with reference to that subject matter so indicated without the title being a mere index of everything contained therein. The provision of the constitution cannot be so narrowly construed as to require the title of an act of itself to contain the entire act. It is sufficient if the title of the act suggests the subject matter; then it includes all that is reasonably auxiliary thereto": *Park v. Modern Workmen*, 181 Ill. 214, 54 N. E. 932. "If the legislature is fairly apprised of the general character of an enactment by the subject as expressed in its title, and all its provisions have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such character, then the requirement of the constitution is complied with. It matters not that the act embraces technically more than one subject, one of which only is expressed in the title, so that they are not foreign and extraneous to each other, but blend together in the common purpose evidently sought to be accomplished by the law. Neither is it important that all the various objects of an act be expressly stated in its title, nor that the act itself indicate objects other than that so mentioned, provided they are not at variance with the one so expressed, but are con-

sonant therewith. Most laws have several objects in view. All criminal legislation has reference, or ought to have, not only to the definition of the offense and the punishment of the offender, but to the suppression of the crime and the reformation of the criminal; yet an express indication of one only of these objects in the title of an act would not therefore make it unconstitutional": *State v. Cassidy*, 22 Minn. 312, 324, 21 Am. Rep. 765; *Winters v. Duluth (Minn.)*, 84 N. W. 788. "The object of the framers of the constitution was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus greatly multiply their number, but it was intended that a proposed measure should stand upon its own merits, and that the several members of the legislature should be apprised of the purpose of the act when called upon to support or oppose it; in other words, members were prohibited from joining two or more bills together in order that the friends of the several bills may combine and pass them. It was never designed to place the legislature in a strait-jacket and prevent it from passing laws having but one object under an appropriate title": *Kansas etc. Co. v. Frey*, 30 Neb. 790, 47 S. W. 87; *Paxton etc. Co. v. Farmers' etc. Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343; *State v. Bemis*, 45 Neb. 724, 64 N. W. 348. "We conceive the rule to be, that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and, no matter how wide the field of legislation, the subject is single so long as the act has but a single main purpose and object. Thus, we would have no doubt of the power of the legislature by a single act to provide a new and complete code of civil procedure, but if the legislature should undertake in an act whose main purpose should be, for instance, to provide for supersedeas bonds, to also provide for the issuing of original summonses, or the effect of a demurrer, we would have no hesitation in saying that such an act contained more than one subject": *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365. "The purpose of the constitutional provision under consideration, as has been repeatedly declared to be, is to give notice through the title of the bill, to the members of the legislature and the public, of the subject matter of the projected law—in other words, that the title should clearly indicate the legislation embraced in the bill. While the requirements of this clause of the constitution are mandatory, they are not to be exactly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject matter is within the scope of the title, the con-

stitutional requirement is met": *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990. "The evil intended to be guarded against was not the inclusion in one act of more than a single matter, but the inclusion therein of matters not properly related among themselves. So by its obvious construction, this constitutional provision justifies and permits legislation by one statute, looking toward a single general object, although it contains and enacts various and multiform matters, if those matters are properly related to each other, and tend to effectuate the general object. It results that when a court is called on to determine whether a statute conforms to this requirement of the constitution, the first duty is to scrutinize its provisions to see if they disclose the general object of the legislation. Then if that object be one, and the various provisions of the statute tend to carry it out, and are not incongruous or improperly related, this requirement will have been complied with": *Newark v. Mt. Pleasant etc. Co.*, 58 N. J. L. 171, 33 Atl. 396. "The title of a legislative bill may be either narrow and restricted or broad and general, as the members of the general assembly may prefer, and, whether it be in the one form or the other in a given instance, all legislation that is germane to the subject as expressed in the title is within the title and permissible under it; but, of course, much that might be germane under the latter class of titles could not be so under the former. If the title adopted be narrow and restricted, carving out for treatment only a part of a general subject, the legislation under it must be confined within the same limits; if it be broad and general, the legislation under it may have a like scope": *State v. Schlitz etc. Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

Matters Germane to the Subject.—Not only may the subject be as comprehensive as the legislative discretion may choose to make it, but the statute relating to it may include every matter germane to, and in furtherance of, the general subject or object expressed in the title: *Barksdale v. Laurens*, 58 S. C. 413, 36 S. E. 661; *Memphis v. American etc. Co.*, 102 Tenn. 336, 52 S. W. 172; *Prison Assn. v. Ashby*, 93 Va. 667, 25 S. E. 893. Thus, in "An act to provide for the formation of corporations" penalties may be provided for the failure of officers of the corporations to comply with its provisions: *Luddington v. Heilman*, 9 Colo. App. 548, 49 Pac. 377; or if it be to prevent the dismissal of cases in the supreme court upon technical grounds, it may impose duties upon judges to see that the certificates of bills of exception are in proper form before signing them, and declare that a failure to perform this duty by them shall not be a cause for the dismissal of an appeal: *McCommons v. English*, 100 Ga. 653, 28 S. E. 386; or if the statute be "to enable park commissioners having control of any boulevard or driveway bordering upon any public waters of this state to extend the same," it may authorize the sale of lands to defray the expenses of authorized improvements: *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277, 45

N. E. 830. "An act to revise the law in relation to criminal jurisprudence" may provide that a person losing moneys at certain games prohibited therein may maintain actions to recover the same: *Larned v. Tiernan*, 110 Ill. 173. A statute to "create sanitary districts and to remove obstructions" in certain designated rivers does not embrace two subjects, if the removal of these obstructions may be rendered necessary by the increased flow of water, "or if such removal can be deemed in any way subsidiary to the drainage system or promotive of its objects, although it may incidentally result in an improvement of those rivers for the purposes of navigation. And in that case the expression of such removal in the title of the bill cannot be deemed an expression of another subject, but an enumeration of a particular matter included in the general subject": *People v. Nelson*, 133 Ill. 565, 582, 27 N. E. 217. "An act in relation to the duties of railroad companies" may also impose liabilities, for "every law prescribing duties must have the sanction of liabilities resulting from a failure to perform those duties, in order to have any practical and efficient operation. To the general mind, the idea of liabilities is as certainly conveyed by the title 'An act in relation to the duties of railroad companies' as it would be by adding 'and prescribing the liabilities for failing to perform such duties'": *Aunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 301, 49 N. E. 582. "An act to regulate the foreclosure of real estate" may authorize the mortgagor, by an instrument in writing executed at the time of his giving the mortgage, to waive the right of redemption: *Atkinson v. Duffy*, 16 Minn. 45. "An act relating to the liability of cities, villages, or boroughs, for damages to persons injured on streets and other public grounds by reason of the negligence of any public officer, agent, or employé of any city, village, or borough," may provide that before any city shall be liable for any injury to any person by reason of any defect in any public ground, or public works of any kind of the city, a notice must be given as required in the act: *Winters v. Duluth (Minn.)*, 84 N. W. 788. To an act to amend a designated section of the code of Tennessee, "so as to raise the age of consent to twelve years, and to prescribe punishment in the penitentiary against persons having carnal knowledge of females under twelve and over sixteen years of age," it was objected that the second section of the act included a subject not expressed in its title and wholly foreign thereto, and that it provided for the punishment of persons aiding or abetting in the commission of the offenses named in the first section, and declared they should be deemed joint principals in the crime, and punished as such. To this the court answered: "Manifestly, this provision is germane to the subject of the act and properly within the legitimate scope of the title. It serves to facilitate the object had in view by the law makers, in that it is well calculated to diminish or restrain the offenses denounced. The subject of legis-

lation is general, and, being so, it is sufficient to cover all provisions in harmony with the object sought to be accomplished. It was not essential that the title be made an index or an epitome of the act, nor that it should set forth the modes, means, or instrumentalities provided in the act for its administration and enforcement": *State v. Brown*, 103 Tenn. 449, 53 S. W. 727.

Matters in Furtherance of or Necessary to Accomplish the Object.—The idea that a statute may include all matters germane to the subject expressed in its title is sometimes stated in language affirming that such statute may include all means in furtherance of, or necessary to the accomplishment of, the objects fairly included within the subject thus expressed. An act to establish an inferior court of criminal jurisdiction in a designated city, "to define its powers and to provide for the election of a judge and the appointment of a clerk thereunder," may confer on the court exclusive jurisdiction of all offenses against the by-laws or ordinances of the city, and also authorize the establishing of a system of hard labor and the sentencing of persons thereto, "there being no law in existence by which the sentence of the court legally imposed could be executed, the act itself would be completely and wholly ineffectual for the purposes intended, unless the act itself made provision for the enforcement of its sentence": *Ex parte Birmingham*, 116 Ala. 186, 22 South. 454. "An act to promote the horticultural interests of the state" may provide for the appointment of the board of supervisors of each county of a horticultural commission, prescribe their powers, fix their compensation, and make the expense of removing or abating an insect pest a lien upon the property or premises from which the nuisance is abated. All these matters point directly to the protection and promotion of the horticultural interests of the state, and hence are included within but one subject, and may properly be grouped in one act under the title last quoted: *Los Angeles Co. v. Spencer*, 126 Cal. 670, 77 Am. St. Rep. 217, 59 Pac. 202. If the title of an act states that it is "for the organization and management of a state reform school," it is sufficiently comprehensive to embrace the bringing together, the collecting and furnishing of pupils or inmates to and for a reform school. Not only that, but the title is broad enough to include provisions in the act for bringing in or bringing together, for collecting and furnishing, whatever is necessary to constitute and carry on a reform school," and the act may include a provision giving courts of record, including probate courts, power to commit to that school boys under sixteen years of age: *In re Sanders*, 53 Kan. 191, 36 Pac. 348; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251. "An act relating to intoxicating liquors" may include a provision that all places where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage are common nuisances, and that the owner or keeper must, upon conviction, be adjudged guilty of maintaining a common nuisance, and punished in the manner desig-

nated in the statute: *State v. Owens*, 9 Kan. App. 595, 59 Pac. 240. Under "an act providing for the incorporation and regulation of motor power companies for operating passenger railways by cables, electrical or other means," they may be authorized to lease the property and franchises of passenger railway companies which they may desire to operate, and to operate such railways. "As the very object of the incorporation of the motor company indicated by this title is to operate a passenger railway, it must have some means of obtaining such railways to operate; it was clearly not intended that they should build nor necessarily buy, for in either case they would become not mere operators, but passenger railway companies themselves. The most obvious, if not the only, way in which they could operate a road was to lease it": *Pinkerton v. Pennsylvania etc. Co.*, 193 Pa. St. 229, 44 Atl. 284. "An act to enable park commissioners to make local improvements and to provide for payment therefor" may include a provision for the making of an assessment to pay the cost of improvements completed before the passage of the act. The provision for a new assessment where one assessment is invalid is within the general subject the legislature embraced in the title, and the existence of such section can scarcely operate as a fraud or surprise upon the legislature as not germane to that subject: *West Chicago Park Commrs. v. Sweet*, 167 Ill. 326, 47 N. E. 278; *West Chicago Park Commrs. v. Farber*, 171 Ill. 146, 49 N. E. 427. A provision authorizing the state board of health in its discretion to prohibit the introduction into any infected portion of the state of persons when, in its judgment, their introduction would add to or increase the prevalence of the disease, is in furtherance of the subject embraced within an act entitled an act to carry into effect "the constitution of the state in relation to boards of health, providing for the establishment and organization of a state board of health, and defining the power, duty, and authority of said board": *Compagnie Francaise v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458, 25 South. 591. "An act to regulate the sale and gift of opium, morphine, eng-she, or cooked opium, hydrate of chloral, or cocaine" may make criminal the having in possession of either of the enumerated drugs, unless obtained for medicinal purposes in the manner provided in the act, though the possessor does not intend to sell or give them away, because such possession cannot be presumed to be of any value to the owner except on the hypothesis that he intends to make a use of the drug injurious to himself or the general public, and the object of the act is clearly to so regulate the sale, possession, and disposition of these dangerous drugs as to prevent the weak and unwary from using them to their physical and mental ruin or to the certain injury of the general public: *Ex parte Mon Luck*, 29 Or. 221, 54 Am. St. Rep. 804, 44 Pac. 692. An act to prohibit and punish combinations calculated to lessen competition in trade may provide a remedy to one injured by such

combination: *State v. Schlitz B. Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1023. We believe it may be declared a general rule that every act may include therein a remedy or penalty for its violation without its being indicated in the title, for such penalty or remedy may always be regarded as germane to or in furtherance of the subject or object mentioned in such title: *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759; *State v. Anderson*, 63 Minn. 208, 65 N. W. 265. "An act to provide for the erection of a state capitol" may, in addition to appointing commissioners and making it their duty to secure plans and specifications for the building to be erected and to acquire a piece of land suitable for the manufacture of brick, and another suitable for a granite quarry, and also declaring that the state penitentiary board should turn over to the commission a certain number of convicts to be worked in the construction of the building in the manufacture of brick and the quarrying of stone, further invest the board of penitentiary commissioners with authority to abandon the present penitentiary grounds of the state and turn them over to the state capitol commissioners, and procure new grounds in place of those thus abandoned and new buildings to be constructed, and may also appropriate moneys for use both in the construction of the capitol and in paying the expenses arising from the abandonment of the penitentiary grounds and the procuring of others in their place; for all of these details are but means of accomplishing the general purpose expressed in the subject of the act, that providing for the erection of a new state capitol: *State v. Sloan*, 66 Ark. 575, 74 Am. St. Rep. 106, 53 S. W. 47.

Details Need not be Mentioned.—It seems superfluous after what has already been said to state that the constitution does not require any enumeration or specification in a title of the different details or subdivisions of the subject named therein: *Ex parte Kohler*, 74 Cal. 38, 15 Pac. 436; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86; *Chicago etc. R. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924; *State Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Paine v. Dickey County*, 8 N. Dak. 581, 80 N. W. 770; *State v. Mines*, 38 W. Va. 128, 18 S. E. 470; *Skinner v. Garnett etc. Co.*, 96 Fed. 735. This must necessarily be so, for if a matter enumerated be but a part of such general subject, nothing is added to the title by such enumeration, and if, on the other hand, it is not a part of such subject, its character cannot be changed by such enumeration, and the enumeration but serves to declare in the title that the statute includes at least two subjects, and that its enactment must therefore be unavailing.

Enumeration of Details does not Create More Than One Subject.—As the test of constitutionality is to inquire whether the act, in truth, embraces more than one subject, the mode of stating that subject in the title may be regarded as immaterial. We have already

shown that the enumeration of the details of the subject is unnecessary. Their mention, however, is not fatal to the title or the act if they constitute but parts of one subject and of matters germane thereto: *State v. Jacksonville etc. Co.*, 41 Fla. 363, 27 South. 221; *State Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809; *Phinney v. Sheppard etc. Hospital*, 88 Md. 633, 42 Atl. 58. Hence, the constitutionality of many statutes has been affirmed, though the form of the title was such as to apparently designate different subjects, when, considering the whole scope of the statute, it manifestly embraced but one general subject. Among the titles thus sustained were the following: "An act providing for the appointment of superintendents of irrigation for the water districts of this state; fixing their compensation and providing for the payment thereof; prescribing their duties and requiring a bond for the faithful performance of each; requiring clerks of district courts to furnish superintendents with certain certified decrees, and providing for the payment of such clerks' fees": *Farmers' etc. Co. v. Agricultural etc. Co.*, 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; "A bill for an act to establish the county of Teller, and the temporary county seat thereof, providing for the appointment of its precinct and county officers, fixing the terms of court therein, and attaching the same to certain congressional, senatorial, representative, judicial, and normal districts": *Frost v. Pfeiffer*, 26 Colo. 338, 58 Pac. 147; "An act to provide for the creation of the city of Pensacola, now known as the provisional municipality of Pensacola, and for the government of said city of Pensacola, and to provide for the support and maintenance of said government and improvement of said city": *State v. Green*, 36 Fla. 154, 18 South. 33; an act "to fix the venue of justices' courts in cities of this state having a population of over one hundred and fifty thousand, and to locate the times and places of holding said courts": *Starnes v. Mutual etc. Co.*, 102 Ga. 597, 29 S. E. 452; "An act to amend the charter of the city of Macon by incorporating as a part of said city a portion of the territory of North Macon, the same being a portion of the lands recently connected with the city by the Spring Street bridge crossing the Ocomulgee river, and containing about ——— acres, and more fully described by metes and bounds in said act, to define the powers and duties of said mayor and council in said territory so incorporated, and for other purposes": *Macon v. Hughes*, 110 Ga. 795, 36 S. E. 247; "An act to prohibit the use of clock, tape, slot, or other machines or devices for gambling purposes": *Bobel v. People*, 174 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322; "An act prescribing certain duties of telegraph and telephone companies, providing penalties therefor, and declaring an emergency": *Central etc. Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; "An act regulating the weighing of coal, providing for the safety of employés, protecting persons and property injured, providing for the proper ventilation of mines, prohibiting boys and females from

working in mines; conflicting acts repealed, and providing penalties for violation": *Maule etc. Co. v. Partenheimer*, 155 Ind. 100, 55 N. E. 751; "An act relating to judicial districts, defining the boundaries of the fifth, eighth, ninth, thirteenth, nineteenth, twenty-fourth, thirty-first, and thirty-second judicial districts, and providing for holding terms of court therein, and defining certain duties of the court in the nineteenth judicial district, and repealing all acts and parts of acts in conflict with this act": *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366; "An act creating two city courts in Kansas City township, Wyandotte county, Kansas, and defining the jurisdiction thereof and the powers and duties of the officers thereof, and limiting the jurisdiction of justices of the peace in said township": *In re Greer*, 58 Kan. 268, 48 Pac. 950; an act "relative to societies for the prevention of cruelty to animals, their organization, their officers, members, and agents, and the fines collected in prosecutions instituted by them, and the duties of municipal corporations with respect thereto": *State v. Karstendiek*, 49 La. Ann. 1621, 22 South. 845; "An act to define what shall constitute fraternal or beneficial societies, orders, or associations; to provide for their incorporation and the regulation of the business, and for the punishment of the violations of the provisions of the act of their incorporation, and to repeal all acts inconsistent therewith": *McMorran v. Great Hive*, 117 Mich. 298, 75 N. W. 943; "An act for the better protection of skilled labor, and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of workingmen or women": *Perkins v. Heert*, 158 N. Y. 306, 70 Am. St. Rep. 483, 53 N. E. 18; "An act to change in part the compensation and mode of payment thereof to the county clerks, recorder of conveyances, clerks of the circuit and county courts in the state and of the sheriffs of the several counties; to repeal certain provisions of statute providing for the payment of certain fees to said officers and of trial fees in certain cases; to provide for the payment by parties to appeals, actions, suits, and proceedings of certain sums to assist the state and the several counties in defraying expenses consequent upon the administration of justice; to provide for the appointment of deputies for the various offices above enumerated in certain cases and for their compensation; and for the payment to the state and several counties of sums of money and fees paid to said officers by parties litigant"; *Northern etc. Trust v. Sears*, 30 Or. 388, 41 Pac. 931; "An act to incorporate the city of Portland and to provide a charter therefor, and to repeal all acts and parts of acts in conflict therewith": *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883; "An act to protect hotel, inn, and boarding-house keepers": *State v. Yardley*, 95 Tenn. 546, 32 S. W. 841; "An act to compile the several acts incorporating the town of Shelbyville, and the several acts amendatory thereto into one act, and to amend the same, and to repeal all acts in conflict with this act": *Cooper v.*

Shelbyville (Tenn. Ch. App.), 57 S. W. 429; "An act to prohibit prize fighting and pugilism and fights between man and animals, and to provide penalties therefor, and to repeal all laws in conflict therewith": *McMeans v. Finley*, 88 Tex. 515, 32 S. W. 524; "An act to define and prevent cold storage in a local option county, precinct, city, town, or subdivision of a county, and to affix a penalty for running, keeping, or maintaining them in such county, city, town, or subdivision": *Ex parte Brown*, 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; "An act to enable the several counties of the state to refund their bonded debt which has matured or may hereafter mature, and to issue bonds in satisfaction of judgment and matured bonds": *Geer v. Commissioners*, 97 Fed. 435.

The Use in the Title After Designating Some Particular Subject Matter of the Words "and so Forth," or "for Other Purposes," or of other words of like signification accomplishes nothing either by way of extending or restricting the title, or of exposing it to, or relieving it from, constitutional objection: *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659; *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 920. It is true that it has been said in one case that the insertion of the phrase "for other purposes" may be sufficient to comprehend subjects not particularly specified but germane to the general subject: *Butner v. Boifeuillet*, 100 Ga. 743, 28 S. E. 464; but, as we have already shown, if a matter is germane to the general subject, it need not be specified in the title, and hence, conceding to the words "for other purposes" the effect here attributed to them, they accomplish nothing which would not be realized if they were omitted from the title.

Illustrations of Subjects Which Include Many Details or Subdivisions. We have heretofore stated the general rule to be, that constitutional provisions of the class here under consideration do not prohibit comprehensiveness of titles, and that no matter how great the scope of a statute, its title will be sufficient if it refers to some general subject, and all the provisions of the subject relate, or are germane to, or in the accomplishment of, matters which may properly be classified under or regarded as part of such general subject. To illustrate the rule and show its practical application by the courts to the cases coming before them, we shall now refer somewhat in detail to various general titles, which have been sustained by the courts and held to be sufficiently comprehensive to support all the provisions of the statutes preceded thereby.

"An act to prohibit and prevent the sale or manufacture of unhealthy or adulterated dairy products" may provide a penalty for selling or exposing for sale unclean, impure, unhealthy, adulterated, or unwholesome milk, may provide that no person shall keep cows for the production of milk for market, or for sale or exchange, or for manufacturing into articles of food in a crowded or unhealthy condition, or feed them food which is unhealthy, or produce impure, unhealthy, or unwholesome milk; and may prohibit the manu-

facture or sale of such milk, or the sale or delivery of any butter or cheese manufactured "of any milk diluted with water or unclean, impure, or adulterated milk," and may regulate the sale of condensed milk, and provide for the appointment and duties of a dairy commissioner: *Butler v. Chambers*, 56 Minn. 69, 16 Am. St. Rep. 638, 30 S. W. 308.

"An act to provide for the organization and government of state banks" may declare it to be unlawful for any individual, firm, or corporation to continue to transact a banking business or to receive deposits for a period longer than six months immediately after the passage and approval of the act, and may impose a penalty for the violation of this provision: *State v. Woodmansee*, 1 N. Dak. 246, 46 N. W. 970.

The title "An act to authorize the incorporation of rural cemetery associations and regulate cemeteries" may exempt from taxation the lands and property of associations formed under the act. The word "regulate" as applied to property devoted to cemetery purposes naturally includes "not only the making of rules for its management by those having it in charge, but also the making of rules governing the conduct of others in respect thereto and of the public in respect to public burdens thereon": *Newark v. Mt. Pleasant C. Co.*, 58 N. J. L. 168, 33 Atl. 396.

There is no doubt that statutes for the formation of corporations may in their title express their purpose in the most general terms, and that without any other designation in the title there may be included in the statutes provisions manifold in number and of infinite variety, provided all are germane to the general subject thus pointed out. If the statute is applicable to all corporations or to a large number, the title may be, "An act to provide for the formation of corporations." Under this title provision may be made requiring the filing of annual reports of the financial condition of all corporations, and in case of the failure to do so, making the directors liable for the corporate debts: *Heilman v. Luddington*, 26 Colo. 326, 57 Pac. 1075; *Tabor v. Commercial Bank*, 62 Fed. 383. "An act to provide for the formation of certain corporations under general laws" may provide that corporations organized under its provisions "for mining or manufacturing purposes shall have power to construct and operate a railroad, tramway, turnpike, or canal for their own uses and purposes to and from their works or places of business, or to connect with some existing railroad, turnpike, or other highway, not to exceed ten miles in length, and shall have the right to condemn for the use of such road the right of way on lands over which the road may pass on payment to the owners thereof of just compensation, to be determined in the manner now provided by law for railroad corporations": *Ex parte Bacot*, 36 S. C. 125, 15 S. E. 204. "An act in relation to the formation of co-operative associations" may authorize the formation of corporations "of trade or of carrying on any lawful mechanical, manu-

facturing, or agricultural business," where the main purpose of the act is "to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations for the purpose of giving employment to such capital, or labor, or skill": *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, 53 N. W. 1150.

If the statute is for the formation of a municipal corporation, it is sufficient for its title to state that it is an act to incorporate the corporation, naming it, and under this title provision may be made in the statute not only for the formation of the corporation, but also for its powers, duties, and liabilities, and all other matters germane thereto: *Firemen's Ben. Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115; *Belleville etc. R. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 598; *Mississippi etc. R. R. Co. v. Wooten*, 36 La. Ann. 441. If the statute relates to a single building and loan association, it is sufficient for its title to declare that it is "An act to provide a new charter for the Iron Belt Building and Loan Association," or giving whatever other name may be chosen for the corporation: *Bosang v. Iron Belt etc. Assn.*, 96 Va. 119, 30 S. E. 440. If, on the other hand, the statute is to authorize the incorporation of associations of this class, its title may declare it to be "An act to regulate the business of building and loan associations," or "An act to provide for the organization, regulation, and inspection of building and loan associations." Under either title may be included all provisions necessary for the creation of such associations and the management of their business, and authority may be given pre-existing associations to avail themselves of the statute by complying with the conditions therein prescribed, and associations may be forbidden to do business in the state without first complying with the provisions of the statute: *Home etc. Assn. v. Nolan*, 21 Mont. 205, 53 Pac. 738; or a license may be exacted of associations organized under the statute or under the laws of any other state or territory, and they may be exempted from the payment of all other licenses or taxes: *City Council v. National etc. Assn.*, 108 Ala. 336, 18 South. 816.

A statute respecting county and township government may be preceded by the comprehensive title of "An act to establish a uniform system of county and township government," and may then contain provisions respecting all the multifarious details which the legislature may deem necessary for the creation and control of such government, including the classification of cities by population, for the purpose of regulating the compensation of their officers, and the compensation of officers of such counties as thus classified. "The creation of townships within a county with the appropriate officers, like the division of the county into school, road, and supervisorial districts with their appropriate officers, is but a part of the county government": *Longan v. County of Solano*, 65 Cal. 122, 3 Pac. 463.

The whole subject of crimes and criminal procedure may be regarded as a unit and dealt with under a single statute entitled,

"An act in relation to crimes and offenses": *State v. Tayler*, 34 La. Ann. 978; *State v. Darrow*, 39 La. Ann. 676, 2 South. 387; or "An act to revise the law in relation to criminal jurisprudence": *Larner v. Tiernan*, 110 Ill. 173; or "Crimes and criminal procedure." "What are crimes and the procedure in criminal cases are cognate subjects, and the definition of crimes and procedure against persons accused of committing them may very properly be embraced in one bill": *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 234. These statutes may also, in furtherance of their general purpose, authorize the maintenance of civil actions in favor of persons affected by the commission of a crime named therein, as where they authorize one losing money by playing at cards or other games to recover the money or the thing lost, and, in default of his bringing suit, giving a right of action to another person to sue for and recover such property. "The only legitimate inquiry here, then, under the adjudications upon this subject, is, as we conceive, What is the provision of this section of the statute in its effect? That if its tendency, in effect, be to the discouragement and suppression of gambling, then it is germane to the general object of the act—not an independent subject—and is sufficiently expressed in the title of the act": *Larner v. Tiernan*, 110 Ill. 173.

The whole subject of damages may be legislated upon under the title of "An act concerning damages," and causes of action may be created thereunder not theretofore existing, as where a right of action is given for injuries inflicted by the wrongful act of another and resulting in the death of a third person. The right or cause of action conferred is not one subject, and the awarding of damages for the violation of that right another and distinct subject. "If any such division of this subject into two branches can be made at all, and if in any sense they are different, nevertheless they are directly connected one with the other; each is germane to the general subject of damages, and the two are altogether congruous and naturally connected": *Mollie Gibson etc. Co. v. Sharp*, 23 Colo. 259, 47 Pac. 266.

Under the title of "An act concerning drainage," or "An act to provide for establishing, constructing, and maintaining drains in this state," the whole subject of drainage may be legislated upon. Provision may be made for the payment of the costs of the construction of drains and for damages resulting by means of assessment of benefits accruing to the owners and of compensation for property appropriated, and the appointment of drainage commissioners may be authorized, and their powers and duties prescribed, and the mode of making and collecting assessments declared, and the collection of reasonable attorneys' fees provided for: *Ross v. Davis*, 97 Ind. 79; *Wishmier v. State*, 97 Ind. 160; *Martin v. Tyler*, 4 N. Dak. 278, 60 N. W. 392.

Under a statute or chapter of the Revised Statutes relating to executions may properly be included all dealing with the property of

debtors in the way of its compulsory application to the payment of their debts, and provision may be made awarding preferences in favor of certain classes of debts, as, for instance, those due to employés and laborers: *Hennig v. Staed*, 138 Mo. 430, 40 S. W. 95.

A statute entitled, "An act relating to life and casualty insurance on the assessment plan," may include within it a section exempting the money or other aid thus paid or rendered by the corporation from liability to attachment or other process for any debt or liability of the certificate holder or beneficiary. Though this section may be regarded as an exemption law, the protection of the fund is not foreign to the business of insurance companies, and "the subject matter of the section is manifestly pertinent to the objects and purposes of the legislation suggested by the title": *Burtin v. Snyder*, 22 Colo. 173, 43 Pac. 1004. "An act to provide for the incorporation of mutual fire insurance companies, and define their powers and duties is sufficient to embrace, without particular mention, provisions for winding them up in case they neglect to perform their duties or exercise their powers. The examination by the commissioner of insurance, the appointment of a receiver, and the assessment of policy holders to pay liabilities and expenses are all necessary incidents to the object expressed in the title": *Wardle v. Townsend*, 75 Mich. 385, 42 N. W. 950. "An act to authorize the organization of mutual insurance companies," expresses but one subject of legislation, under which may be grouped all provisions properly applicable to the subject of mutual insurance: *State v. Moore*, 48 Neb. 870, 67 N. W. 876. An act entitled, "An act to provide for the incorporation and regulation of insurance companies," warrants legislation regulating the business within the state of foreign insurance companies, and the prosecution of their agents for unlawfully transacting business in their behalf: *Hickman v. State*, 62 N. J. L. 499, 41 Atl. 942; affirmed in 44 Atl. 1099.

An effective statute prohibiting or regulating the sale of intoxicating liquors must necessarily contain a great variety of provisions intended to aid the purpose sought by the act, and none of these provisions need be separately enacted if the title of the act is sufficiently comprehensive. "An act to regulate and license the sale of spirituous liquors, to prevent the adulteration thereof, to repeal former laws, and to prescribe penalties," may prohibit the giving away of intoxicating liquors to a minor or to a person already in a state of intoxication, and may impose a penalty for the violation of this prohibition. The object of the statute is to prevent abuses that might flow from the unrestrained disposal of liquors, and "it would seem that the giving away under circumstances which might produce the same evil results as the selling would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary incident to a statute regulating the sale to secure its efficient operation": *State v. Adamson*, 14 Ind. 296. "An act to regulate and license the sale

of spirituous, vinous, malt, and other intoxicating liquors" may require, as a condition to granting a license, that the applicant shall give a bond with two sureties in the amount in the statute specified, conditioned to keep an orderly and peaceable house, and to pay all fines and costs that may be assessed against him for violating the provisions of the act and for the payment of all judgments for civil damages growing out of unlawful sales: *Kane v. State*, 78 Ind. 103; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469; *Shea v. Muncie*, 148 Ind. 14, 46 N. W. 138; *Poffenbarger v. Smith*, 27 Neb. 788, 43 N. W. 1150; *Peavey v. Goss*, 90 Tex. 89, 32 S. W. 317. Where the title of an act declares its subject to be the prohibition of the sale of intoxicating liquors, it has always been held that the real subject of the act was not the sale of the liquors, but the prohibition or restriction of their use in the cases falling within the purview of the act, and hence that it might contain a clause prohibiting the giving away of such liquors. "What is the subject of a penal law may generally be perceived by ascertaining the mischief or evil the law was designed to remedy or to prevent." Therefore, if a statute is apparently intended to prevent or restrict the use of intoxicating liquors at a specified time or among a designated class of persons, the giving away may be prohibited thereunder, notwithstanding the title refers only to the sale: *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Cearfoss v. State*, 42 Md. 403. A statute entitled, "An act to provide for the taxation and regulation of the business of manufacturing and selling intoxicating liquors," may make it unlawful for a minor to remain or be employed in any room where such liquors are sold: *People v. Japinga*, 115 Mich. 222, 73 N. W. 111.

Acts incorporating specific municipal corporations, or authorizing a classification of municipal corporations, afford, perhaps, the best illustration of the infinite variety of topics which may be included within one general subject. These acts usually provide not merely for the formation of corporations, but also for their powers and the powers of the various officers thereof, as well as penalties for violating provisions of the charter or general law, and embrace practically as wide a range as the code or the revised or compiled statutes of a state. Nevertheless, there is no need of mentioning these several matters in the title, for the reason that they do not constitute different subjects, and their enactment might reasonably be apprehended by anyone knowing that the legislature proposed to authorize or provide for the government of the particular corporation or class of corporations in question. As shown in the principal case, "An act to amend and consolidate the charter of the city of Crookston," is a sufficient title, and under it, "we should naturally expect to find such provisions as might be necessary for the proper government of a municipality": *Crookston v. County Commrs.*, 79 Minn. 283, ante, p. 453, 82 N. W. 586; *State v. Bemis*, 45 Neb. 724, 64 N. W. 348. A title, "An act concerning cities," sufficiently expresses its subject

matter, and may prescribe the duties of the president of the city council or other governing body, including a provision that on request of one-fourth of the total membership of calling a special meeting thereof: *State v. Camden*, 58 N. J. L. 515, 33 Atl. 846. "An act for the formation of borough governments" may contain a provision conferring on a municipality the power of eminent domain: *State v. North Plainfield* (N. J.), 42 Atl. 805. Under the title of "An act in relation to the village of Brockport," the attempted pre-existing incorporation of the village and all proceedings had for that purpose, and the election of the village officers pursuant thereto, and all acts and proceedings of the board of trustees and other officers, may be validated. Such act may also provide for the election, compensation, and duties of the assessors of the village, the authority of its trustees to raise and expend highway taxes, to license, regulate, and prevent the public use of or keeping for use or hire billiard-tables or ball-alleys, the election of a police judge, and the definition of his jurisdiction and power. All these matters properly relate to and are embraced within the title, because each and every one of them is germane to its general subject: *People v. Sutphin*, 66 N. Y. Supp. 69. The title, "An act to incorporate the city of Austin, to grant it a new charter, and to extend its boundaries," may authorize the city council to create a board of equalization and regulate its duties. "Under such a title legislation on various subjects may be enacted, provided the subjects dealt with are connected with and in furtherance of the main object indicated by the title. The title of the act under consideration was broad enough to authorize the legislature to provide a complete system of municipal government, including the essential subject of taxation, and any mode which might be deemed advisable for the assessment and collection of taxes, including the creation of a board of equalization": *Nalle v. Austin* (Tex. Civ. App.), 56 S. W. 954.

Codes and Revised Statutes.—Illustrations of the general subjects under which an infinite variety of particulars may be grouped because they are but a part of one great subject or of matters germane thereto might be multiplied indefinitely, but we shall content ourselves with the citations already given and with calling attention to the decisions sustaining statutes of a more general and comprehensive character than those to which we have heretofore referred, to wit, codes and compiled or revised statutes intended to express either the whole of the general laws of a state, or of some great subdivision of such laws. The subject was first approached in 1854, when it was suggested that the article in the laws of Texas pertaining to the estates of deceased persons was void because its title did not express the entire subject, that title being, "An act to regulate proceedings in the county courts pertaining to the estates of deceased persons." Without giving any considerable attention to the subject, the statute was sustained on the ground that "it did not come within the mischiefs which it was the object of this

provision of the constitution to prevent, and it is not, we think, in violation of its letter and spirit": *Murphy v. Menard*, 11 Tex. 673. Thirteen years later, in 1867, a provision respecting executions was assailed on the ground that it was a part of an act entitled, "The Code of Civil Practice," and in the particular subdivision entitled "Executions." In repelling this assault, the supreme court of the state said: "The argument is that these sections of the statute are found in an act entitled, 'The Code of Civil Practice,' and in the particular subdivision entitled 'Execution'; that they are not, therefore, embraced in the title, nor is the matter thereof connected with the object or subject of the act itself. Upon this subject we have no difficulty. Chapter 125, of which these sections form a part, relates to executions, the manner of issuing the same, their levy, the stay, sales thereunder, and the appraisement of property taken under the writ. And that this is a legitimate part of the Code of Civil Procedure no one can for a moment doubt": *Porter v. Thomson*, 22 Iowa, 391. In thus sustaining the subdivision in question, the court necessarily affirmed the sufficiency of the title to the whole statute and the constitutionality of a single statute covering the whole domain of civil practice. In 1880, article 17 of the Code of Criminal Practice of Kansas was questioned on the ground that the statute contained more than one subject. This statute was entitled, "An act to establish a code of criminal procedure," and was divided into seventeen articles, each treating of separate matters. The article challenged provided for the appointment by the probate court of a trustee of the estates of imprisoned convicts, and prescribed the mode of application and the bond and powers and duties of trustees. It was said that this provision had nothing to do with the prevention or the prosecution for crime. The court partly grounded its opinion holding the statute to be constitutional upon the fact that the article in question had stood from the very first legislation of the state and territory as a part of the chapter concerning criminal procedure, and that its validity had not theretofore been attacked. "Evidently," said the court, "the legislature intended by this title one whose scope was broad enough to include the article, and while there is a sense in which the article does not treat of criminal procedure, yet we must impute to the legislature an intent to use the title in a broader sense. No one can have been misled by this title; no legislature—at least no recent legislature—imposed upon by the introduction of this article. It was never surreptitiously passed, and while the constitutional provision is mandatory, yet it is to be liberally construed and so as not to prevent or embarrass ordinary legislation": *Woodruff v. Baldwin*, 29 Kan. 491. In 1882 the Revised Statutes of Ohio were questioned as being in conflict with that part of the constitution of the state declaring that no bill should contain more than one subject, which should be expressed in its title; but the court was enabled to sustain the statute on the ground that this

constitutional provision was in that state directory merely: *Oshe v. State*, 37 Ohio St. 494. In 1883 the supreme court of Missouri upheld section 24 of the Revised Statutes of the state, consisting of nearly nine hundred pages, passed as one bill, embracing the entire subject of crime and criminal procedure, under the title of "Crimes and Criminal Procedure": *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 234. In December, 1891, decisions were rendered by the supreme courts of Minnesota and Washington sustaining, respectively, an act of the former entitled, "An act to establish a probate code": *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382, 50 N. W. 923; and the act of the legislature of the state of Washington known as "the Code of 1881": *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520. In 1892 the court of appeals of Colorado sustained "An act to amend chapter 24 of the General Laws" of that state, entitled "Criminal Code," saying that this title "fully complies with article 5, section 21, of the constitution, both in letter and spirit; and we are further of the opinion that the caption "Criminal Code" is broad enough to embrace every offense against the law that can be classified as misdemeanor or felony as well as criminal pleading and practice": *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773. In Florida commissioners were appointed to revise, simplify, arrange, and consolidate the public statutes then in force into one body, and they reported to the legislature a set of "revised statutes" containing, in the main, statutes already in force, but adding new matter, and as to such new matter, it was conceded that, to give it effect, such revised statutes must have been enacted as provided in the constitution for other statutes, namely, with a title containing but one subject matter, and that sufficiently expressed therein. The act adopting these statutes was entitled, "An act to enact the Revised Statutes of the state of Florida, and to provide for the printing, sale, and distribution thereof." The court said, when the question was presented to it in 1893, that it was unable to discover "any serious difficulty in reference to the manner in which the Revised Statutes were adopted," and referred to previous actions of the legislature of the state in adopting the common and statute laws of England, and, at a later date, the Code of Procedure, adding that the constitution under which the Revised Statutes were enacted was substantially the same as that in force at the passage of the pre-existing laws thus referred to: *Mathis v. State*, 31 Fla. 291, 12 South. 681. In 1894, the court of appeals of Texas sustained "An act to adopt and establish the Revised Civil Statutes of the state of Texas," but the assault upon the statute appears rather to have been a questioning of the mode of its enactment than of its constitutionality: *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711. In 1896 an attack upon "An act to adopt a code of laws for the state of Alabama" was repelled by the supreme court of that state: *Ex parte Thomas*, 113 Ala. 1, 21 South. 369; and in 1898 the supreme court of North Dakota affirmed the validity

of the Political Code of that state, which constituted part of its revised codes of 1895 and of a provision therein declaring that county printing should be done within the state, and if practicable, in the city ordering the same: *Tribune Co. v. Barnes*, 7 N. Dak. 591, 75 N. W. 904. The case in which this question is best considered is that of *Central etc. Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, determined by the supreme court of Georgia in 1899. In that state a commission was appointed for the purpose of reporting a code. Its code as reported was approved by the legislature, which passed what was known as "the adopting act" of 1895. The court said: "It is further contended by counsel for plaintiff in error that the adopting act of 1895, if given the construction we have placed upon it, is violative of article 3, section 7, paragraph 8, of the constitution (Civ. Code, sec. 5771), which declares that 'no law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof.' This presents the only question in the case which, to our minds, is at all difficult of solution. An act adopting a code necessarily, in one sense, refers to a great many subjects, and enacts into statute provisions not germane one to another. We have, however, after much reflection, thought, and research, reached the conclusion that the position of the able counsel of plaintiff in error is founded upon a misconception of the real meaning and purpose of the provision in the constitution above quoted. This constitutional restriction prohibiting the passage of any law containing matter different from what is expressed in its title originated in this state, and grew out of a memorable event in its history. The act of January 17, 1795, known as the 'Yazoo act,' had for its purpose, as its title declared, 'payment of the late state troops,' and 'protection and support of its frontier settlements.' The body of the act made a large grant of land to a private company of speculators, and when the fraud was discovered it gave rise to a long and bitter controversy between the leaders of different parties and factions in the state: *Mayor etc. v. State*, 4 Ga. 38; *Howell v. State*, 71 Ga. 227, 51 Am. Rep. 259. The manifest purpose, then, of this provision in the constitution was to prevent a repetition of such fraud. Its object, therefore, was not to prevent comprehensive, but surreptitious, legislation. The other provision—that no bill shall contain more than one subject matter—does not appear in the constitution of 1798, but has since become a part of our constitutional law. Its object was not so much to prevent surreptitious legislation as to inhibit the passage of what is often termed 'omnibus' or 'log-rolling' bills. A bill may contain more than one subject, and yet, if its title clearly indicates all its subjects, it will not be apt to mislead the legislature as to its intent and scope, and cannot, therefore, be considered surreptitious legislation. Experience, however, taught that it was often the case that many matters were embraced in the same bill adverse in their nature, and having no

necessary connection, with the view of combining in their favor the advocates of all, and thus securing the passage of several measures, no one of which could succeed upon its own merits. It was to prevent this dangerous practice that our organic law declares that a bill should contain but one subject matter. An act, however, adopting a code or a system of laws obviously does not fall within any of the classes of mischiefs which this restriction in the constitution was intended to remedy. No one need be misled by a title to an act which declares that its purpose is to adopt a certain code or system of laws; nor is there anything in such an act to occasion any alarm that it would pass contrary to the wishes of the people by virtue of improper combinations among members of the legislature. What the constitution looks to is unity of purpose. It does not mean by one subject matter only such subjects as are so simple that they cannot be subdivided into topics; but it matters not how many subdivisions there may thus exist in a statute, or how many different topics it may embrace, yet if they all can be included under one general, comprehensive subject, which can be clearly indicated by a comprehensive title, such matter can be constitutionally embodied in a single act of the legislature. . . . In our research upon this subject we have been unable to find any authority in this state or elsewhere tending to hold, or even suggesting, that an act of the legislature adopting a system of laws is obnoxious to a constitutional provision prohibiting the passage of any bill containing more than one subject matter. The contrary view is supported by abundant authorities, some of which we will now cite. Cooley, in his excellent work on Constitutional Limitations, fifth edition, 174, declares: 'The generality of a title is, therefore, no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intentment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it.' The constitution of the state of Minnesota provides that 'no law shall embrace more than one subject, which shall be expressed in the title.' In *Johnson v. Harrison*, 47 Minn. 575, 28 Am. St. Rep. 382, 50 N. W. 923, it was decided that an act entitled 'An act to establish a probate code,' was not obnoxious to this constitutional provision. It appears that the act establishing this code in Minnesota embraced twenty-one subchapters, containing three hundred and twenty-six sections. The legislature adopted in the form of one act a complete system of statutory law relating to those matters over which probate courts have jurisdiction, namely, estates of deceased persons and of persons under guardianship. In *Ex parte Thomas*, 113 Ala. 4, 21 South, 369, it is declared: 'A code or body or system of law adopted, or enacted by a single act of the general assembly, though it may contain inconsistent or repugnant provisions, or

one section or part may be modified, and to the extent of the modification, controlled, by another, is not within the letter or spirit of the mandate of the constitution. It is not within the legislative evil it is designed to remove, nor can it be supposed that it was within the contemplation of the framers of the constitution. Though, for convenience, the code is published in two volumes, the one pertaining entirely to that which may be termed civil, and the other to that which may be termed criminal, legislation, it was adopted by a single act, entitled "An act to adopt a code of laws for the state of Alabama." It is true the constitution of Alabama authorizes the adoption of a code by the legislature, but the constitution of Alabama nevertheless required that the subject should be described in the title, and Brickell, C. J., in that case quoted the following from Walker, C. J., in *Ex parte Pollard*, 40 Ala. 98: "The constitution requires that only one subject should be embraced, and that it should be described in the title. "Subject" is a very indefinite word. A phrase may state the subject in a very general or indefinite manner, or with minute particularity. The subject of laws with such titles as the following: "To adopt a penal code," "to adopt the common law of England in part," "to adopt a code of laws," "to ratify the by-laws of a corporation," would be expressed in a very general way, and very little knowledge of the specific provisions of the laws could be gleaned from the title; yet it would nevertheless be true that the subject was described in the title': See *Bales v. State*, 63 Ala. 30-34; *Dew v. Cunningham*, 28 Ala. 466, 65 Am. Dec. 362; *Hoover v. State*, 59 Ala. 57. The constitution of the state of Washington provides that 'no bill shall embrace more than one subject, and that shall be expressed in the title': Art. 2, sec. 19. In the case of *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, it was held that the code of 1881 of that state was a valid and binding body of laws, arranged and consequently sectionized under authority of the legislature of 1881 from laws revised and re-enacted by that body, and ratified by subsequent legislatures by constant reference thereto as the code of 1881. On page 276, 3 Washington, the court says: 'If the legislature can thus, by a name sufficiently comprehensive, embrace all the subjects properly relating to civil procedure, it must follow that by adopting a subject sufficiently general it can embrace in one act all the statute law of the state. In other words, the legislature may adopt just as comprehensive a title as it sees fit, and if such title, when taken by itself, relates to a unified subject or object, it is good, however much such unified subject is capable of division.' There is a like restriction in the constitution of West Virginia against the passage of laws containing more than one subject, and containing matter different from what is expressed in the title. In *State v. Mines*, 38 W. Va. 139, 18 S. E. 470, it was said: 'It cannot be doubted that under the title of the act passed in 1868 establishing a code of laws it was valid to insert' in that code a named section. The present constitution of Texas

allows only one subject matter in an act. The Revised Statutes were adopted by an act entitled, 'An act to adopt and establish the Revised Civil Statutes of the state of Texas.' In *McLane v. Paschal*, 8 Tex. Civ. App. 398, 28 S. W. 711, the court of civil appeals of Texas decided that this act, passed in 1879, was a legal and constitutional enactment. In *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365, it was declared: 'The object . . . of the constitution providing that "no bill shall contain more than one subject, and the name shall be clearly expressed in its title," is to prevent surreptitious legislation. If a bill has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate this provision of the constitution.' On page 74 of the same case the court says: 'We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and no matter how wide the field of legislation, the subject is single so long as the act has but a single main purpose and object. Thus, we would have no doubt of the power of the legislature by a single act to provide a new and complete code of civil procedure,' etc. Other authorities might be cited with like import, but these are quite sufficient to show the trend of judicial decision upon the subject. Our conclusion, therefore, is, both upon reason and authority, that the act of December 16, 1895, contains but one subject, which is clearly embraced in the title of the act. That subject is the adoption of a code of laws for Georgia. Though comprehensive and of vast extent in its range, it nevertheless preserves the constitutional principle of unity. While all the various sections of the code are not germane one to the other when considered separately, yet, taken together, they are directly connected with, and relate to, this great subject, and constitute one system of laws for the state."

Where, as in California, there are several codes, each having a title indicating the general nature of the provisions contained in it, as the Political Code, the Penal Code, the Civil Code, and the Code of Civil Procedure, it is possible that original or amendatory legislation may be placed under one of these codes, or general titles, so clearly and exclusively appropriate to another, that its enactment cannot be sustained as a part of the code in which it is placed. It is, however, inevitable that provisions be found in each code which, standing alone, should be in some other. They must nevertheless be sustained if they are germane to or connected with any subject matter properly placed in that code, or necessary for the accomplishment of any object validly included in such code. We have already shown that every act imposing obligations or creating rights may impose penalties for not performing those obligations or not respecting those rights: *Gieseke v. County of San Joaquin*, 109 Cal. 489, 42 Pac. 446; ante, pp. 460, 470. Hence,

there is no doubt that penal provisions may be sustained, though not included in the Penal Code, when they are connected with some subject properly included in the code of which they are a part. Nor is a penal code or statute necessarily restricted to defining crimes and imposing penalties for their commission. It may further create a civil liability against persons guilty of the commission of a crime and prescribe the remedy for its enforcement: *Larner v. Tiernan*, 110 Ill. 173.

In Proposing Amendments to Compiled Laws or to General or Revised Statutes, legislatures have often specified the precise section or sections amended and stated the special subject matters thereof, as by declaring the amendatory act to be an act to amend section — of an act entitled (giving the title of the original statute), and adding, relating to (here naming the precise subject matter of the proposed amendment): *Hellman v. Shoulters*, 114 Cal. 136, 141, 44 Pac. 915, 45 Pac. 1057. This particularity is neither necessary nor desirable, and may be pursued to the extent of limiting the subject matter of the amendment beyond the intention of the legislature. There is no doubt that a title which declares the amendatory statute to be an act to amend a designated section or sections, chapter or chapters, or other subdivision or subdivisions of a statute (giving the full title of the original act) is sufficient, and that the precise nature of the amendatory act need not be further specified: *Clay v. Central R. R. Co.*, 84 Ga. 345, 10 S. E. 967; *Bush v. Indianapolis*, 120 Ind. 476, 22 N. E. 422; *Hoskins v. Crabtree* (Ky.), 44 S. W. 434; *State v. Read*, 49 La. Ann. 1535, 22 South. 761; *Fullilove v. Police Jury*, 51 La. Ann. 359, 25 South. 302; *Comstock v. Judge of Superior Court*, 39 Mich. 195; *Kelly v. Minneapolis*, 57 Minn. 294, 47 Am. St. Rep. 605, 59 N. W. 304; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Winona v. School District*, 40 Minn. 13, 12 Am. St. Rep. 687, 41 N. W. 539; *State v. Madson*, 43 Minn. 438, 45 N. W. 586; *Ward v. Board of Equalization*, 135 Mo. 309, 36 S. W. 648; *De Both v. Rich Hill etc. Co.*, 141 Mo. 497, 42 S. W. 1081; *State v. Cornell*, 50 Neb. 526, 70 N. W. 56; *English etc. Co. v. Hardy*, 93 Tex. 289, 55 S. W. 169; *Nobles v. State*, 38 Tex. Cr. Rep. 330, 42 S. W. 978. Upon principle, if a statute as originally enacted is preceded by a title sufficient to warrant the enactment thereunder of a matter found therein, the same title must be sufficient for every amendment which can be proposed germane to the provisions of the original act, and further, for all new provisions which could in the first instance have been constitutionally enacted under the title preceding such original act. As it was not necessary in the original statute to designate in the title the sections to which it was appropriate nor the subject matters of each section, neither can it be necessary to make such designation in amendatory statutes. It is further sufficient by way of title to an amendatory statute to declare that it is an act to amend an act (giving the full title of the original act): *Thomas v.*

State, 124 Ala. 48, 27 South. 315; Lewis v. State, 123 Ala. 84, 20 South. 516; Bagwell v. Lawrenceville, 94 Ga. 654, 21 S. E. 903; Greencastle etc. Co. v. State, 28 Ind. 382; Willis v. Mabon, 48 Minn. 141, 31 Am. St. Rep. 626, 50 N. W. 1110; Dyker etc. Co. v. Cook, 3 N. Y. App. Div. 164, 38 N. Y. Supp. 222; David v. Portland etc. Co., 14 Or. 98, 12 Pac. 174; Commonwealth v. Morgan, 78 Pa. St. 198, 35 Atl. 389. "The title to the amendatory act in no way indicates the character of the amendment beyond a correct recital of the title of the act amended. It is not, however, important that the title of an amendatory act shall do more than recite the title or substance of the act amended, provided the amendment is germane to the subject of the original act and is embraced within the title of such amended act. In other words, if the title of the original act is sufficient to embrace the matter covered by the amendment, it is unnecessary that the title of the amendatory act should of itself be sufficient": Hyman v. State, 87 Tenn. 109, 9 S. W. 372; State v. Algood, 87 Tenn. 163, 10 S. W. 310; Brandon v. State, 16 Ind. 197; People v. Parvin, 74 Cal. 549, 16 Pac. 490. Hence, the following titles are sufficient: "An act to add an additional article to the Code of Public Laws, to be entitled 'Garrett County'": State v. Fox, 51 Md. 412; "An act to amend the several acts incorporating the town of Lawrenceville": Bagwell v. Lawrenceville, 94 Ga. 654, 21 S. E. 903; "An act to amend an act entitled 'An act to incorporate the city of Portland'": David v. Portland etc. Co., 14 Or. 98, 12 Pac. 174. An act complete in itself may under the title of an act to amend an act (giving the original title) be superseded by another law of a similar complete character which is valid, though it operates incidentally to modify other statutes, all of its provisions being germane to the title and subject of the act amended: Henry v. Ward, 49 Neb. 392, 68 N. W. 518. While, in referring to the act amended, the date of its enactment is usually stated, this is necessary, provided there be but one statute having the title named. In determining this question, it was said: "It is true that the title of the amendatory act does not refer to the chapter or year when the original act was passed, but this is unimportant, especially as there was no other act of the same title. Similar statutes have been invariably sustained in this and other jurisdictions having the same constitutional provision": Willis v. Mabon, 48 Minn. 140, 31 Am. St. Rep. 626, 50 N. W. 1110. "Where there exists a compiled statutes supposed to contain all the laws in force at the date of the publication, an amendment thereof may be made by proper reference thereto, and if the amendatory act clearly points out the portion of the statute amended, it is valid. Hence, a title, 'An act amendatory of and supplemental to chapter 50 of the Compiled Statutes of 1885, entitled "Liquors,"' is valid, and additional matter may be added germane to the purposes of such chapter 50": In re White, 33 Neb. 812, 51 N. W. 287. Where one act purports to be an amendment of another, it is not essential that the amendment be cognate to the section amended,

If it is cognate to the general subject of the original act: *State v. Madson*, 43 Minn. 438, 45 N. W. 856. Where an amendatory act was entitled, "An act to repeal or strike out certain redundant, obsolete, and inoperative provisions of the general statutes of 1889," and the amendments were numerous, including various sections in the act relating to different subjects, many of which were not either redundant, obsolete, or inoperative, it was held invalid, and though the court spoke of such amendatory act as containing different subjects not enumerated in the title, it is clear that its decision can best be justified on the ground that the amendment extended beyond the title, in that the latter purported to relate only to redundant, obsolete, and inoperative provisions, while the act itself went beyond these provisions for the purpose of effecting those unquestionably in force: *State v. Sholl*, 58 Kan. 507, 49 Pac. 658.

"When an act of assembly is a supplement to a former act, if the subject of the original act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is, that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto": *Philadelphia v. Ridge etc. Ry. Co.*, 142 Pa. St. 484, 24 Am. St. Rep. 512, 21 Atl. 982; *American Surety Co. v. Great White Spirit Co. (N. J.)*, 43 Atl. 579. The following titles, therefore, are sufficient to embrace but one subject, which is adequately expressed therein: An act supplemental to (giving the title of the original act): *Loomis v. Runge*, 66 Fed. 856; "A further supplement to an act entitled 'An act to protect trademarks and labels'": *Schmalz v. Wooley*, 57 N. J. Eq. 303, 73 Am. St. Rep. 637, 41 Atl. 939; "A supplement to an act entitled 'An act regulating lateral railroads,' approved the 5th day of May, 1882, authorizing the owners or lessees of iron or coal mines to construct lateral railroads from said mines to any railroad, public road, or navigable stream within the county in which such mines are situated": *In re Rogers*, 192 Pa. St. 97, 43 Atl. 475.

Amendments to Codes.—The rules already stated respecting amendments to other laws are equally applicable to amendments to codes. In a majority of cases it has been the custom of legislators to precede a statute amending a code with the title, "An act to amend section, chapter, article, or other subdivision, as the case may be, of the code [specifying the particular code amended], relating to [here designating the special subject matter of the section, chapter, article, or other subdivision amended]." There is no doubt that such title is sufficient, and contains but one subject, which is properly expressed therein: *Carpenter v. Furrey*, 128 Cal. 668, 61 Pac. 369; *Lewis v. State*, 148 Ind. 346, 47 N. E. 675; *Guaranty Sav. etc. Assn. v. Aschermann*, 108 Iowa, 150, 78 N. W. 823; *Iowa Sav. etc. Assn. v. Selby (Iowa)*, 82 N. W. 968; *State v. Long*, 21 Mont. 26, 32 Pac. 645; *State v. Anaconda etc. Min. Co.*, 23 Mont. 498, 59 Pac.

854; Fehr v. State, 36 Tex. Cr. Rep. 93, 35 S. W. 381, 650; State v. Mines, 38 W. Va. 125, 18 South. 470; In re Moore, 81 Fed. 356. It is clear that this particularity is unnecessary. The subject of the act is stated in the original statute, and no restatement of it is necessary or desirable in an amendatory statute other than that involved in the giving of the title of the code or other act to be amended. It is sufficient, therefore, to state that the act is to amend a particular section or other subdivision of the code: People v. Parvin, 74 Cal. 549, 16 Pac. 490; Udell v. Citizens' St. R. R. Co., 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799; State v. Marion County Court, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; Dowty v. Pittwood, 23 Mont. 113, 51 Pac. 727; State v. Robinson, 32 Or. 43, 48 Pac. 357; State v. Runnels, 92 Tenn. 320, 21 S. W. 665; State v. Brown, 103 Tenn. 449; 53 S. W. 727; Tabor v. State, 34 Tex. Cr. Rep. 631, 53 Am. St. Rep. 726, 31 S. W. 662; Erskine v. Steele County, 87 Fed. 630; Steele Co. v. Erskine, 39 C. C. A. 173, 98 Fed. 215. It is equally unnecessary in the title to specify the section or subdivision of the code or statute to be amended. Otherwise, it would be impossible by amendment to add any new or other subdivision. The contrary is the frequent practice: State v. Long, 21 Mont. 26, 52 Pac. 645; Fehr v. State, 36 Tex. Cr. Rep. 93, 35 S. W. 381, 650; Nichols v. State, 32 Tex. Cr. App. 391, 23 S. W. 680. The title, "An act to amend an act entitled 'An act to adopt and establish a Penal Code for the state of Texas,' approved August 26, 1871," is sufficient and will sustain the amendment, though an error occurs in using the figures 1871 instead of 1876, where the state has never had but one "Penal Code," and there can, therefore, be no doubt respecting the act or code intended to be amended: State v. McCracken, 42 Tex. 383. So, though the title of the amendatory act declares that it is to amend a specified section or other subdivision of a particular code, when there is no such section or subdivision, the title can be treated as sufficient by disregarding as surplusage the designation of such subdivision or section, and treating the title as though it merely declares the act to be one to amend the code in question: State v. Robinson, 32 Or. 43, 48 Pac. 357. A single statute amendatory of a code may amend some sections, repeal others, and add new sections, provided the act as amended is such as might have been validly enacted in the first instance under the title given the original code or other statute: San Francisco etc. R. R. Co. v. State Board, 60 Cal. 12; Commonwealth v. Brown, 91 Va. 762, 21 S. E. 357. Hence, in the case last cited a statute with the following title was sustained, "An act to amend and re-enact sections 2131, 2133, 2134, 2135, 2137, 2148, 2151, 2153, and to repeal sections 2141, 2142, 2143, 2144, 2145, and 2147 of chapter 97 of the Code of Virginia in relation to oysters, and to add independent sections thereto."

Restrictive Titles of Amendatory Statutes.—If the title of an act declares it to be an amendment of a specified section or sections,

or other subdivision or subdivisions of a code or other statute, this is, in effect, a declaration that no new matter is proposed by way of amendment not germane to the section or subdivision designated, and, therefore, a restriction upon the subject matter of the act, and any matter contained in the amendatory act and extending the limits of this restriction must be disregarded. It is a subject not expressed in the title as thus restricted: *State v. Southern Ry. Co.*, 115 Ala. 250, 22 South. 589; *Mobile v. Louisville etc. Ry. Co. (Ala.)*, 26 South. 902; *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990; *State v. Stewart*, 52 Neb. 243, 71 S. W. 998; *State v. Cornell*, 54 Neb. 72, 74 N. W. 432; *Scott v. Bowen*, 54 Neb. 211, 74 N. W. 615; *Laramie Co. v. Stone (Wyo.)*, 51 Pac. 605. Therefore, unless it is clear that the amendments desired to be enacted are germane to the section or sections in the code, the title to the amendatory act should be general and not special.

Amendatory Statutes Depend Upon and Should not Vary from the Title of the Statute Amended.—The title of the original act cannot be improved or enlarged by the amendment. In other words, every amendatory statute depends for its validity not upon its title, but upon the title of the statute which it professes to amend. If that title is sufficient to sustain the enactments found in the amendatory statute, it must be sustained: *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278; but if insufficient, then the amendatory statute cannot be sustained, though in its title the subject was attempted to be enlarged or more minutely described. Speaking of an amendment to the Political Code of that state, the supreme court of California declared that such code constituted but a single statute, that “if, in such case, the title of the original act did not state its subject, both the statute and any amendment of it would be void. But it is enough if the title of the statute is recited; it is not necessary that the subject of the particular section amended shall be stated in the title of the amendatory act. It is to be understood, of course, that if any subject shall be embraced in a section of an act passed under the present constitution, which shall not be expressed in the title of the act, the section is void. It follows, also, that, under pretense of amending a particular section, the legislature cannot legislate upon a subject not embraced in the title of the original act. If it be said that the title of the amendatory act of April 15, 1880, does not express the subject, the reply is that the constitution does not require, in case of an amendment, that the subject shall be any more fully stated than it is stated in the valid statute amended. . . . The constitution only requires that the title of the act which it is proposed to amend shall be clearly mentioned or recited in the act amending a particular section. This being done, the sufficiency of the title of the amendatory act depends upon the sufficiency of the title of the original act”: *People v. Parvin*, 74 Cal. 549, 16 Pac. 490. Under the title of “An act to amend an act entitled ‘An act to create a commissioner of public works, defining

his duties and powers, prescribing his compensation, and making appropriation,' approved March 24, 1893, relating to the office of the commissioner of public works," section 2 of the original act was amended so as to provide that the duties of the commissioner should cease at a date specified, and his office thereafter be discontinued, it was objected that this was not within the title of the amendatory act, but the court answered that, "the fixing of the term or tenure of office under an act such as this, or the abolition of the office, are matters embraced within, and germane to, the subject of the original act, and they may find an expression in an amendatory act without specific mention of them in the title to such amendatory act. Such is the well-settled rule based upon very obvious considerations": *Leake v. Colgan*, 125 Cal. 413, 58 Pac. 69. Speaking of an amendatory act the title of which was assailed, the court of appeals of Virginia said: "There is another view which may be urged in support of the sufficiency of the title. It will be observed that it is an amendatory act and not the original act on the subject. In such case, if the title of the original act is sufficient to embrace the matters covered by the provisions of the act amendatory thereof, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient. If the title of the original act is sufficient to embrace the matters contained in the amendatory act, whether that of the amendatory act is itself sufficient is unimportant": *Commonwealth v. Brown*, 91 Va. 762, 21 S. E. 357; *St. Louis v. Teifel*, 42 Mo. 578; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278. An amendatory act entitled, "An act to revise and amend chapters 176 to 186, inclusive, regulating the jurisdiction and procedure before justices of the peace in civil cases," was assailed on the ground that there had been added to a section thereof a declaration that all justices of the peace in office should continue to act until the expiration of their commissions and until their successors in office were elected and qualified. It was insisted that this section was outside of the title of the amendatory act. It was found on examination, however, that one of the chapters proposed to be amended purported to be "of justices of the peace and their courts," and the court declared that if the title of the original act were sufficient to embrace the provision contained in the amendatory act, the latter was good, and it need not be inquired whether its title would of itself be sufficient, and that applying this principle to the case before it, as the act whose title the court was considering was on its face a revisory and amendatory bill, and the chapters revised and amended might be taken as the amended act, and the title prefixed by the general statutes might be accepted as the title of such chapters, and, therefore, as the amendatory legislation might have been enacted under such title, the amendatory statute was valid: *State v. Ransome*, 73 Mo. 78. Speaking of an amendatory statute, the supreme court of Wisconsin said: "In order to determine whether the subsequent amend-

ments of the 'act to incorporate the Yellow River Improvement Company' are violations of the constitution, we must inquire whether the provisions contained in such amendments could have been embodied in the original act of incorporation without violating the constitution. If, under the original title of the act incorporating the company, it would have been competent to confer upon the corporation the powers contained in the amendments, then there can be no doubt of the power to confer them upon it by way of amendment to such act, and under the title of an 'act to amend' the original act, reciting its title. Any additional powers may be given to the company under an amendatory act which could have been constitutionally conferred under the original act": *Yellow River Imp. Co. v. Arnold*, 46 Wis. 214; *Union Depot Co. v. Commissioner of Railroads*, 118 Mich. 340, 76 N. W. 631; *Ex parte Howe*, 26 Or. 181, 37 Pac. 536.

GILBERT v. HEWETSON.

[79 Minn. 326, 82 N. W. 655.]

TRUSTS AND TRUSTEES—DEALINGS IN TRUST PROPERTY.—A receiver, trustee, attorney, agent or any other person occupying fiduciary relations respecting property or persons is utterly disabled from acquiring for his own benefit the property committed to his custody for management.

TRUSTS AND TRUSTEES—DEALING WITH TRUST PROPERTY—AGENT OF RECEIVER.—A trusted clerk and confidential adviser of a receiver having full charge of the conduct of the receivership, subject to the approval of the receiver, is not permitted to take advantage of his position to deal or traffic in the property or property rights of the receivership to his own advantage or benefit, and to the detriment of the trust.

RECEIVERS, FOREIGN—TITLE TO CHOSSES IN ACTION. A receiver of the property of a resident of one state appointed in a creditor's suit in that state, to whom all property of the debtor is transferred by order of the court, thereby acquires title and the right to recover upon a debt due the debtor from a resident of another state. The situs of such debt is at the domicile of the creditor.

LIMITATIONS OF ACTIONS—PLEADING.—The statute of limitations, to be available as a defense, must be pleaded, and if not pleaded is waived, except when the question is raised by demurrer, although the bar of the statute appears on the face of the complaint.

TRUSTS AND TRUSTEES—DEALINGS WITH TRUST PROPERTY—AGENT OF RECEIVER.—A receiver or other trustee of an express trust cannot permit nor authorize his agent to do with the trust estate what he is not permitted to do himself. He cannot speculate with the trust property to his own advantage and benefit, nor can he authorize or ratify such acts on the part of his agent.

Webber & Lees, for the appellant.

Munn & Thygeson and J. P. Kyle, for the respondents.

330 BROWN, J. This is an action to enforce a constructive trust. The defendants had judgment in the court below, and the plaintiff appeals.

The facts, in brief, are as follows: In December, 1889, in a creditors' suit brought in the superior court of Cook county, in the state of Illinois, one Edward A. Filkins, of the city of Chicago, was duly appointed by said court receiver of the property and estate of the defendant in such action, Niels C. Frederiksen, with all the powers, rights, and duties of receivers in such cases. Said Filkins duly qualified as such receiver, and thereafter continued to act as such until August 5, 1892, when he resigned, and afterward, by proper order of the same court, the plaintiff in this action was duly **331** appointed his successor. Plaintiff duly qualified as such, and now is the duly qualified and acting receiver in such matter. At the time of the appointment of such receiver, said Frederiksen resided in the state of Illinois. In addition to such appointment, said superior court duly made a further order requiring said Frederiksen to deed and transfer to said receiver all and singular his property, real, personal, and mixed, and requiring and ordering that, in case of his failure to make such transfer, John T. Noyes, a master in chancery of said court, do so for him. Frederiksen refused to make the transfer, and said master in chancery duly made and executed a proper conveyance of said property to such receiver.

From December, 1889, to August, 1892, the defendant Michael Hewetson was in the employ of said receiver as clerk, and as such had general charge of the business of the receivership, with access to the books and papers pertaining thereto, and during the whole of said time occupied a position of trust and confidence to said receiver with respect to the business, property, and effects belonging to the estate. Among other items of property claimed by said receiver to belong to said Frederiksen, and to said receiver, by virtue of his said appointment, were certain causes of action against one Nunnenmacher for the recovery of usurious interest by him unlawfully taken from Frederiksen, which causes of action were claimed to amount in the aggregate to between \$100,000 and \$200,000; the facts with reference to which were unearthed and brought to light by said Hewetson acting as such confidential clerk. Said Nunnen-

macher resided in the state of Wisconsin. The receiver brought an action in the circuit court of that state, seeking a recovery upon such causes of action, and the supreme court of that state held that a receiver appointed by the court of another state could not maintain such an action in the state of Wisconsin: *Filkins v. Nunnenmacher*, 81 Wis. 91, 51 N. W. 79. A motion for a reargument of said cause was duly made to that court, and the same was pending at the time of the settlement to be presently mentioned.

During the time he was so acting as the agent and clerk of said receiver, said Hewetson also discovered from the books and papers in his charge and under his control that one Rice, a resident of the ³³² state of Wisconsin, held and owned certain promissory notes against said Frederiksen, amounting in the aggregate to the face value of about \$96,000. Subsequent to the decision of said supreme court of Wisconsin, and pending the motion for a reargument, said Hewetson, and certain of the attorneys who had been retained by and were acting for said receiver, connived and conspired together to purchase said Rice notes, and therewith, and by means of a suit thereon against Frederiksen in the courts of Wisconsin, coupled with a garnishment against said Nunnenmacher, to force a settlement with said Nunnenmacher upon said causes of action so due to said Frederiksen, and to appropriate the proceeds thereof to their own use and benefit. Said Hewetson and attorneys understood from the decision of said Wisconsin supreme court that the receiver could not enforce his claim to the causes of action against Nunnenmacher in the courts of that state, and they sought to take advantage of the situation, and secure the same for their own benefit. In pursuance of this agreement between said Hewetson and said attorneys, said Hewetson, some time in the year 1891, negotiated a sale of said promissory notes from said Rice to one of said attorneys for the sum of \$3,000. Later on in said year, and while said receiver's action to recover from said Nunnenmacher was still pending in said supreme court of Wisconsin, said attorney to whom said notes were sold and transferred brought suit thereon in the circuit court of Wisconsin against said Frederiksen, the maker thereof, and said Nunnenmacher as garnishee, seeking thereby to charge said Nunnenmacher with the indebtedness which the receiver was endeavoring to obtain by his suit. The attorneys so engaged with said Hewetson were the same attorneys who were acting for the receiver in his suit against Nunnenmacher.

In February or March, 1892, the said attorneys procured a settlement from said Nunnenmacher of both the receiver's suit and the action brought by them on said Rice notes, and Nunnenmacher paid to them in full adjustment of the Frederiksen claims against him the sum of \$36,000—\$1,000 in settlement of the receiver's suit, and \$35,000 in settlement of the suit on the Rice notes. The receiver accepted the \$1,000, supposing that that was all he could realize. He was so advised by said attorneys. The receiver knew that one ³³³ of his attorneys held the Rice notes, that action had been brought thereon, and also knew that negotiations were pending for the settlement thereof, but he did not know the nature of the settlement made. It was in August following this settlement that the plaintiff succeeded the former receiver.

Hewetson received, as his share of the profits of this transaction, the sum of \$5,333.33, of which sum he invested \$3,000 in the lands described in the complaint. The purchase price of the land was \$6,179.85. Of this Hewetson paid said \$3,000 in cash. The balance was paid subsequently, and from the proceeds of sales of certain portions of the land. Other facts are set out in the findings of the trial court, but the foregoing, though not as full and complete as such findings, is a sufficient statement to give an understanding of the questions presented.

The action is one to impress the land with a trust in favor of plaintiff to the extent, at least, of the \$3,000 invested therein by Hewetson from the proceeds of the Nunnenmacher deal. It is founded on the fundamental principle of equity jurisprudence that a receiver, agent, attorney, or other person occupying a position of trust and confidence, respecting the business or property of another, will not be permitted or allowed to take advantage of his position to deal or traffic in the property or property rights of his trust to his own advantage or benefit. A person occupying such fiduciary relation is held strictly to an honest performance of his duties in the interests of his principal, and to the absolute exclusion of his own personal interests. The principle is very clearly stated in *King v. Remington*, 36 Minn. 15, 29 N. W. 352.

A receiver, trustee, attorney, agent, or any other person occupying fiduciary relations respecting property or persons is utterly disabled from acquiring for his own benefit the property committed to his custody for management. This rule is entirely independent of the fact whether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from

the trustee. It is to avoid the necessity of any such inquiry that the rule takes so general a form. The rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts between self-interest and integrity. It seeks to remove the temptation ³³⁴ that might arise out of such a relation to serve one's self-interest at the expense of one's integrity and duty to another, by making it impossible to profit by yielding to temptation. It applies universally to all who come within its principle.

This case comes fairly within this principle. Hewetson was a trusted clerk and confidential adviser of the receiver; had full charge of the conduct of the receivership, subject to the approval of the receiver; and, with knowledge and information gained while holding such position, he, with the attorneys of the receiver, sought to enrich themselves at the expense of the trust estate. He may have proceeded in good faith—may have supposed that the receiver had no title or interest in the Nunnenmacher claims—but his good faith does not relieve him. It is not necessary to show fraud in such cases. Equity declares all such transactions illegal, and all profits accruing to the trustee to belong to the cestui que trust, without regard to any intentional or other fraud: *King v. Remington*, 36 Minn. 15, 29 N. W. 352. The court below recognized this principle, but disposed of the case adversely to plaintiff, mainly on the theory that the Nunnenmacher causes of action did not pass to the receiver, and that he was in no way injured by the transaction. Counsel for respondents urge this and other reasons in support of their contention that the judgment should be affirmed. We are satisfied that the findings of fact are sufficient to warrant a judgment in plaintiff's favor, unless the position of the trial court with respect to some legal questions is correct. We will therefore turn our attention to such questions.

1. It is urged by respondents, and the court below held, that there was no showing of a legal liability on the part of Nunnenmacher to Frederiksen on account of the alleged causes of action for usurious interest, and that, in consequence, the receiver lost nothing by the conduct of Hewetson and the attorneys, and cannot complain. This contention cannot be sustained. Hewetson unearthed, by an examination of the books and papers belonging to Frederiksen, what he considered, and what all the attorneys considered, and evidently believed, to be a valid claim against Nunnenmacher, amounting to more than \$100,000. The receiver's action in Wisconsin was brought to recover upon that

claim. It is not ³³⁵ important whether the claim was in point of law valid and enforceable. To end the litigation, not only the receiver's suit, but the one brought by the attorneys, in which Nunnenmacher was made garnishee, upon the theory that he was indebted to Frederiksen, Nunnenmacher settled with the attorneys, and paid them upon that claim the sum of \$36,000. He thereby confessed an indebtedness to Frederiksen in that sum. It belonged to Frederiksen, and the defendant and attorneys engaged with him appropriated it to their own use. They were engaged to act for the receiver, and were under every moral and legal duty to preserve and protect the interest of the trust estate. The money was paid to them in settlement of a cause of action which they knew was claimed by the receiver, and they cannot be heard to say that Nunnenmacher was not legally liable thereon.

2. The court below also held, in line with respondents' contention, that no title or interest in or to the Nunnenmacher cause of action passed to the receiver by the order of the court appointing him, or by the deed of the master in chancery. This contention is not based on any defect or omission in the order or deed, but upon the claim that the supreme court of Wisconsin so held, and it is insisted that the courts of this state should follow that decision. In this position we cannot concur.

By the order of the Illinois court, plaintiff was appointed receiver of all of Frederiksen's property, real, personal, and mixed, including choses in action of every kind, and the deed of the master in chancery conveyed the same to him. The decision of the Wisconsin supreme court is quite broad, and, on its face at least, seems to justify respondents' contention. It is there stated, in effect, that a receiver appointed in a creditor's suit by a court of another state acquires no title or interest to property located in Wisconsin. Whether this is sound law we need not consider. We do not believe that that court intended its decision to go to that extent. It certainly could not have intended so to decide with respect to the property here involved, because it was not located in that state at the time the receiver was appointed or since. The property consisted of certain causes of action for alleged usurious interest taken by Nunnenmacher from Frederiksen, and amounted to a debt or ³³⁶ chose in action, and had a situs at the residence of the creditor. Frederiksen resided in the state of Illinois at the time of the appointment of the receiver, and, in contemplation of law, this cause of action, or these causes of action, were with his person in said state, and undoubtedly

passed to the receiver: *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 383, 71 Am. St. Rep. 492, 75 N. W. 740; *Putnam v. Pitney*, 45 Minn. 242, 47 N. W. 790; *State v. Gaylord*, 73 Wis. 316, 41 N. W. 521; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 42 Atl. 479, 69 Am. St. Rep. 99, and cases cited in note on page 117. We do not, therefore, believe that the Wisconsin court intended to hold that the receiver acquired no title to the causes of action against Nunnenmacher, but only that he could not maintain an action to recover thereon in that state. That the court intended to go no further than this is evident by the syllabus. It is clear to us, and we hold, that the Nunnenmacher causes of action passed to the receiver, belonged to the trust estate, and that Hewetson and the attorneys had no right to purchase or to otherwise acquire the same for their own profit and and benefit.

3. Respondents' contention that the plaintiff's cause of action is barred by the statute of limitations is wholly untenable. The case of *Hardwick v. Ickler*, 71 Minn. 25, 73 N. W. 519, most effectually puts at rest the question whether the statute must be pleaded to be available as a defense. It is there held that the statute is waived if not pleaded; and this, notwithstanding the bar of the statute may appear on the face of the complaint. The claim that plaintiff's cause of action is barred by laches is also untenable.

4. Counsel also urge that the receiver knew that his attorneys had purchased the Rice notes, and were endeavoring to enforce the same against Nunnenmacher, and that he made no objection thereto, but silently acquiesced therein, and it is claimed that he thereby waived all right to object to the transaction or to bring the parties to account. While it is true that the receiver had some knowledge as to the purchase of the Rice notes by Hewetson and his attorneys, and that they were endeavoring to enforce the claim against Nunnenmacher, this by no means amounts to a waiver of his rights or to a ratification of the acts of his agents. He was himself an agent, a trustee of an express trust, and he could not permit or ³³⁷ authorize his agent to do with the trust estate that which he himself could not do. He could not speculate in the trust property to his own advantage and benefit, nor could he authorize his agents to do so. It would be a perversion of the law to hold that an agent could, by his silence, authorize, ratify, or sanction an act he could not expressly authorize, sanction, or approve.

We have examined all the other points made by respondents, and find none of them fatal to appellant's right of recovery. The facts found by the trial court warrant at least a portion of the relief demanded in the complaint, and the judgment should have been for plaintiff. It is beyond question that Hewetson and the attorneys engaged with him violated the trust reposed in them and they should be compelled to account. Hewetson acquired, with \$3,000 of his share of the profits of the deal, the lands in question, and the receiver should be adjudged to have a specific lien thereon to the extent of such \$3,000, and interest since the date of the Nunnenmacher settlement at the rate allowed by law. The judgment appealed from is therefore reversed, and the cause remanded, with directions to the court below to amend its conclusions of law so as to direct the entry of judgment in plaintiff's favor, adjudging and decreeing said sum of \$3,000 and interest to be and constitute a specific lien upon the lands in question, and authorizing the enforcement thereof by execution, as in other cases.

Judgment reversed.

A TRUSTEE MAY NOT BECOME INTERESTED personally in the trust property: *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320, 33 Am. St. Rep. 315, 30 N. E. 667; *Galbraith v. Tracy*, 153 Ill. 54, 46 Am. St. Rep. 867, 38 N. E. 937; *Petrie v. Badenoch*, 102 Mich. 45, 47 Am. St. Rep. 503, 60 N. W. 449.

A RECEIVER IS A TRUSTEE for all the parties: See the monographic note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 353.

SUITS BY FOREIGN RECEIVERS are treated in the notes to *Straughan v. Hallwood*, 8 Am. St. Rep. 49-54; *Alley v. Caspari*, 6 Am. St. Rep. 185-189. Receivers appointed upon the removal of an assignee for the benefit of creditors may maintain an action in relation to personal property of the assigned estate situate in another state: *Whitman v. Mast*, 11 Wash. 318, 48 Am. St. Rep. 874, 39 Pac. 649. But see *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 39 N. E. 1091.

THE STATUTE OF LIMITATIONS MUST BE PLEADED in order to be available: *Valz v. First Nat. Bank*, 96 Ky. 543, 49 Am. St. Rep. 306, 29 S. W. 329.

STEINBACH v. BRANT.

[79 Minn. 383, 82 N. W. 651.]

ASSIGNMENT OF WAGES TO BECOME due, indefinite as to amount, unlimited as to time, without acceptance by the employer, and without notice to an attaching creditor, is void as to the latter.

F. B. Robinson and W. S. Hammond, for the appellant.

A. Coffman, for the respondent.

383 LEWIS, J. In proceedings in garnishment instituted by plaintiff in justice court, the garnishee was served with the summons on January 6, 1899, and appeared on the return day, January 14, 1899, and disclosed that it was indebted to defendant, Brant, in the sum of ninety-one dollars and forty-one cents, and stated that the Sioux Trust Company claimed the money under a written assignment, and demanded that the claimant be made a party. This was done and claimant appeared, and answered that it was the owner of the money, under a written assignment. A hearing was had upon the pleadings, and judgment was rendered for the claimant for the sum of ninety-one dollars and forty-one cents damages, and against the plaintiff for costs. Plaintiff appealed to the district court upon questions of law alone. In the district court the judgment 384 was reversed, and judgment was ordered for the plaintiff and against the garnishee for the sum of ninety-one dollars and forty-one cents. From an order denying its motion for a new trial, claimant appeals.

The return from the justice court shows that defendant, Brant, was in the employ of the garnishee from October 6, 1898, continuously up to the time of the service of the garnishee summons, January 6, 1899; that on the day of such service the garnishee was indebted to defendant in the sum of eighty-two dollars and seventy-seven cents, which he had earned as wages in December, 1898, and eight dollars and sixty-four cents which he had earned in January, 1899. It also appeared that Brant had drawn his pay direct from the company every month from the date of the assignment. The return shows that claimant proved Brant's signature to the assignment, but no evidence was offered either as to the consideration of the assignment, or as to the nature of the contract of employment of defendant by the garnishee, or as to whether anything was actually due claimant at

the time of the service of the garnishment. The claimant bases its claim to the money wholly upon the written assignment, which is as follows (Exhibit "A"):

"State of Iowa, }
Woodbury County. } ss.

"For value received, I hereby sell, assign, and transfer to the Sioux Trust Company my claim against the C., St. P., M. & O. Railway Company for wages now earned and to be earned, due and to become due. And I do hereby represent, guaranty, and do solemnly swear that I am now employed by the said railroad company as conductor, and that there are no other assignments, liens, or garnishments against me or my wages, and that there is now due me from said railroad company the sum of \$120.00; and I fully understand that I am making this affidavit for the purpose of effecting the above sale of my claim against said railway company.

"Residence, St. James, Minn.

J. W. BRANT.

"Subscribed and sworn to before me this 6th day of October, 1898.

_____, Notary Public.

"Filed Feb. 23, '99.

W. E. ALLEN,

"Justice of the Peace."

This instrument contains the words "for value received," and those words import a consideration, and it was not necessary to prove it: *Frank v. Irgens*, 27 Minn. 43, 6 N. W. 380; *Elmquist v. Markoe*, 39 Minn. 494, 40 N. W. 825. As to the amount of the claim then earned, this instrument operated as an assignment, and as to the wages "to be earned" and "to become due," conceding that it operated as an equitable assignment of the future earnings so far as the parties to the instrument were concerned, still, as to creditors of the assignor, there is some uncertainty, under the authorities. It is a general rule that, if the wages assigned are definitely defined and certain as to time, character, and amount, they may be assigned, when predicated upon a present contract for continuous employment. And, if the assignment is merely in the form of an order upon the employer it must be accepted by the employer before it becomes binding upon either creditors or employers. It has also been held that, where the wages to be earned are definite and certain, they may be assigned, although not predicated upon a contract for continuous employment, but are wages earned in an existing

employment, in its nature continuous: *Metcalf v. Kincaid*, 87 Iowa, 443, 43 Am. St. Rep. 391, 54 N. W. 867; *Hartley v. Tapley*, 2 Gray, 565; *Emery v. Lawrence*, 8 Cush. 151. That phase of the question now under consideration has never been before this court. In *O'Connor v. Meehan*, 47 Minn. 247, 49 N. W. 982, the assignment was under seal, for value received, duly acknowledged by the assignor, and definitely referred to the wages to be earned for a certain month. In that case, however, the assignment was held to be invalid as to creditors, upon the ground of fraud.

Our attention has not been called to any case holding that, when the wages to be earned are uncertain, they may be assigned. But the case of *Boylen v. Leonard*, 2 Allen, 407, is similar to the one before us. In that case the assignment was absolute in form, for a consideration, and assigned all wages due and to become due from the employer. It was contended in that case that, the wages being indefinite and not limited as to time, the assignment was void for uncertainty as to creditors attaching wages earned nine months after the date of the assignment. The court held the assignment good, but based its decision upon the fact that not only was the employment continuous in its character, but it was based upon an original contract to labor for an indefinite period of time, and that ³⁸⁶ the employer had so understood the assignment and recognized it, by making various payments to the assignees before the service of the process.

In the record before us, we find no evidence of a contract for continuous employment. The wages to be earned are not stated or limited to any time, but are indefinite and uncertain, and there is no evidence that there was anything actually due the assignee at the time of service of the garnishment summons. On the contrary, the assignor had collected the wages every month himself. Such an assignment might pass to the assignee the contingent possible interest of the assignor in the future wages, and, if the labor was afterward performed and the wages earned, the assignee could enforce his equitable interest against the assignor; but such a doctrine is too indefinite and uncertain in its application, and subject to too many possibilities, to apply to creditors and employers without notice. We hold, under the facts in this case, that the assignment was void as to the plaintiff.

Order affirmed.

AN ASSIGNMENT OF WAGES to be earned in the future will be upheld: *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; although the employment is for no definite time: *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599; *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220.

BRAUN v. NORTHERN PACIFIC RAILWAY COMPANY.

[79 Minn. 404, 82 N. W. 675, 984.]

RAILROADS—PARENT AND CHILD—EXPULSION FOR NONPAYMENT OF FARE.—If a parent enters a railway train with his child non sui juris and subject to the payment of fare, and refuses to pay the fare of such child, both may be expelled from the train, though the parent has paid his own fare.

RAILROADS—PARENT AND CHILD—EXPULSION FOR NONPAYMENT OF FARE—DAMAGES.—The expulsion of a child, liable to pay fare, from a railway train for the failure of the parent to pay such fare, is, whether rightful or wrongful, the expulsion of the parent also, and if the parent has paid his own fare, such expulsion without first having returned, or offered to return the latter's ticket or the unearned value thereof, is a violation of the contract to carry the parent to his destination, and such a wrong as to render the railway company liable in damages.

C. W. Bunn and L. T. Chamberlain, for the appellant.

M. Heim and Stevens, O'Brien, Cole & Albrecht, for the respondent.

⁴⁰⁶ BROWN, J. This action is one to recover damages for the alleged wrongful expulsion of plaintiff and his infant son from one of defendant's ⁴⁰⁷ passenger trains on August 7, 1898. The facts are as follows: On August 5, 1898, plaintiff applied to a railroad ticket agent at Cleveland, Ohio, for through railroad tickets from that city to Hebron, in the state of North Dakota, for himself, wife, four children, and two adult persons not members of his family. What occurred between him and the ticket agent is best disclosed by the evidence as follows:

"Q. Well, did you have any talk with this man before you bought the tickets? A. Yes. Q. Now tell us, slowly, what that talk was, so all these gentlemen will understand you. A. I come to the office, and ask what it cost—a ticket to North Dakota, Hebron; one ticket. He tell me it cost twenty-nine dollars—one ticket. Q. He told you twenty-nine dollars, the price of the ticket? A. Yes; one ticket. And he says when I buy more

tickets I get cheaper. And I tell him I got four small children, and I and my wife and two girls, and he says— Q. He says what? A. He says, 'I give you four tickets for the whole family, for the whole eight persons, and you pay me for every ticket \$27.25.' And I say, 'All right,' and I give him \$109, and put my name and he gave me four tickets. Q. Was anything said between you about the ages of the children? A. No, nothing. I ask him before I buy the tickets, 'I got four small children.' He ask me how old the oldest one. I told him eight years. He says: 'All right. He pay nothing.'"

The tickets were delivered to plaintiff, and he at once started on his journey with the members of his party, reaching St. Paul on the morning of August 7th. The agent of whom such tickets were so purchased was an agent of the Nickel Plate railroad, but was authorized to sell through tickets over connecting lines between Cleveland, by way of and over defendant's line, to said Hebron. As stated, plaintiff's party consisted of four adult persons and four children. Among the children was a boy of the age of eight years. Plaintiff obtained no separate ticket for the boy, and had no written evidence that he was entitled to passage with the other members of the party, but plaintiff claims that his right of passage was covered and secured by the contract with the Cleveland agent under which the tickets were purchased. Counsel for defendant do not question the authority of this agent to sell the tickets to plaintiff, nor the validity of the tickets. But they do question and contest the validity of the alleged contract for the passage of the ⁴⁰⁸ boy without payment of fare. They insist that the authority of the Cleveland agent was limited to selling tickets, and that he had no authority or power to contract for the transportation of children without tickets, nor to agree for the defendant company that children over five years of age should be carried free. Defendant's passenger rates and instructions to agents were offered and received in evidence, from which it appears, among other things, that children under twelve and over five years are required to pay half-fare rates for tickets or transportation.

Whether the Cleveland agent had authority to make a contract, binding on defendant, for the transportation of plaintiff's boy free—for such is the result of the transaction shown by plaintiff's testimony—is a question clothed in much doubt, and is difficult of solution. We are not agreed on the subject. And as another feature of the case, presented by the pleadings and evidence, renders a decision of the question unnecessary, we pass

it without discussion. The evidence tending to prove such contract may be referred to upon the question whether plaintiff entered defendant's train with his boy, and insisted upon his passage without a ticket other than the one he himself possessed, in good faith, and without wrongful intent to defraud the company; and it was proper for the consideration of the jury on the question of damages. While we differ on the question of the authority of the Cleveland agent to enter into the alleged contract for the free transportation of the boy, we are agreed that plaintiff's recovery should be sustained on the rule laid down in the case of *Wardwell v. Chicago etc. Ry. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 49 N. W. 206.

Plaintiff and his party entered one of defendant's trains on the morning of August 7, 1898, at St. Paul, to continue their journey to Hebron. Before arriving at Minneapolis, the conductor or ticket collector in charge of the train took up their tickets, and returned in place thereof conductor's checks or tickets, the precise nature of which is not shown by the evidence; but we may assume, basing such assumption upon a common knowledge of the custom of railroad companies in such matters, that the tickets or checks returned to plaintiff were the ordinary checks given by conductors, and entitled the plaintiff to passage on that day and train only. On discovering ⁴⁰⁹ that plaintiff's eight year old son had no ticket, the conductor demanded that his fare be paid, or that he leave the train. Plaintiff refused to pay the fare, claiming that he was entitled to free passage under the contract with the Cleveland agent. The conductor refused to recognize such contract, and ejected the boy from the train as it was leaving the station at Minneapolis, but did not return his ticket to plaintiff, or offer to return it. The train was in motion at the time, but the boy was in no way injured. Upon the expulsion of his son, plaintiff left the train, and remained with him. Before doing so, he handed to his wife the conductor's checks or tickets given him in lieu of his tickets, and she continued on her journey with the other members of the party. Plaintiff and his son resumed their journey some four days later.

It is conceded that plaintiff had a ticket entitling him to passage on defendant's train to Hebron, and it may be conceded that his son, who was of fare-paying age, had no ticket and no right to a free passage; and we have for consideration the question whether the expulsion of the son from the train for the failure of the father to pay his fare, without first having re-

turned, or offered to return, the latter's ticket, was a violation of the contract to carry the father to his destination, or such a wrong as to render it liable in damages. The father having entered the train with his son, who, as we have noted, was but eight years old, and having refused to pay his fare when demanded, the defendant had the lawful right to eject them both from the train: *Beckwith v. Cheshire*, 143 Mass. 68, 8 N. E. 875; *Lake Shore etc. R. R. Co. v. Orndorff*, 55 Ohio St. 589, 45 N. E. 447, 38 L. R. Ann. 140, 60 Am. St. Rep. 716, and cases cited in the note. This is on the theory that, as the parent is in charge of the child who is non sui juris, the law implies a contract on his part to pay the child's fare, and, on his refusal to do so, both may be expelled from the train: *Philadelphia etc. R. R. Co. v. Hoefflich*, 62 Md. 300, 50 Am. Rep. 223. There is no claim that plaintiff was personally expelled or removed from the train, or that he was requested or ordered to get off. The contention on his part in this respect is that the forcible removal of his son was, under the circumstances, a justification for his leaving the train, and, in effect, his removal as well as the removal of the son.

Counsel for defendant conceded on the argument that, if the ⁴¹⁰ removal of the son was wrongful, it would operate as the removal of the father, but contended that, if the removal of the son was rightful, then such removal would not operate as the removal of the father. We cannot concur in this latter contention. The reason for the rule that the expulsion of the child operates as an expulsion of the parent is the same, whether applied to a case where the child may be lawfully and rightfully removed, or to a case where such removal is wrongful. The reason for the rule is found in the laws of humanity and nature. It is the parent's duty to care for and protect his child. There is an inseparable bond of unity between them. And to hold that where the child is forcibly removed and ejected from a railroad train in a strange city, among strangers, whether rightfully or wrongfully, the act of the parent in following the child is purely voluntary on his part, and that such removal of the child is not in effect the removal of the parent, would do violence to the sacred relations existing between parent and child, and the laws of humanity and nature. In such case the departure of the parent from the train is not voluntary in the sense that it is of his own choosing or of his own free will. On the contrary, the act of the railroad company in removing the child is the inducement, the cause, and it would be unreasonable to

say that under such circumstances the parent left the train of his own free will. So we conclude that the ejection of a child of tender years from a railroad train for the failure of the parent in charge of and accompanying the child to pay its fare, whether rightful or wrongful, is in effect the ejection and removal of such parent: *Gibson v. East Tennessee etc. Ry. Co.*, 30 Fed. 904.

It remains to be considered whether the failure of defendant to return to plaintiff his ticket, or its unearned value, renders it liable to him in this action. The complaint is broad enough to sustain such recovery, and we believe the question is ruled by the case of *Wardwell v. Chicago etc. Ry. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 49 N. W. 206. It is there held that such failure to return the fare actually paid by the passenger renders the company liable. We quote from the opinion in that case, at page 517: "As precedent to the right to expel him from the train, he [the conductor] ⁴¹¹ should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion."

It was not the duty of plaintiff to demand the return of his ticket before leaving the train, but, on the contrary, it was the duty of the conductor of the train to return it, or its equivalent, as a condition precedent to his right to eject him: *Bland v. Southern Pac. R. R. Co.*, 55 Cal. 570, 36 Am. Rep. 50. Nor is it important or material to the right of action that a ticket was subsequently furnished him, with which he continued his journey: *Wardwell v. Chicago etc. Ry. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 49 N. W. 206. It is not disputed but that defendant's conductor or collector took up plaintiff's ticket, returning to him a conductor's check; and it is not claimed that the original ticket was returned, or offered to be returned, before the boy was ejected. If, as suggested by a member of the court, the original ticket had been canceled by the conductor, and thereby rendered worthless and of no value as an evidence of plaintiff's right of passage on a subsequent train, then it was the duty of defendant to return in lieu thereof its unearned value, or some evidence or token which would answer every purpose of the ticket uncanceled.

We are unable to distinguish this case, on principle, from the *Wardwell* case, and feel constrained to follow and apply the law

there laid down. A verdict of two hundred dollars was sustained in that case, and no reason occurs to us why the same amount should not be sustained in this case. We have examined all the assignments of error, and find none of sufficient consequence to warrant a new trial. The charge of the court that the jury might take into consideration the plaintiff's pecuniary condition, in reduction of damages—for such is the effect of the charge—was in defendant's favor and furnishes no ground for complaint. The fact that the instruction on this subject was favorable to defendant was recognized by its counsel, as shown by the exception taken thereto, and no exception was taken because it was adverse to defendant's rights or interests.

The order appealed from is affirmed.

412 A motion for a rehearing having been made, the following opinion was filed May 22, 1900:

BROWN, J. In view of the vigor and earnestness shown in appellant's application for a reargument of this cause, we deem it not out of place to add just a word in denying it. The original opinion was prepared after such consultation and examination as the press of business before the court would warrant, and the statement there made concerning the custom of conductors in taking up tickets from passengers, and returning to them a substitute amounting to no more than an evidence that the passenger has paid his fare, was based on what we supposed and believed, and still suppose and believe, to be known to every person who has ever traveled on railroad trains. The authorities supporting us are numerous: *Isaacson v. New York etc. R. R. Co.*, 94 N. Y. 278, 46 Am. Rep. 142; *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Downey v. Hendrie*, 46 Mich. 498, 41 Am. Rep. 177, 9 N. W. 828. "Judges cannot denude themselves of the knowledge of the incidents of railway traveling which is common to us all": *Siner v. Great Western R. Co.*, L. R. 4 Ex. 117, 123. And we may add, further, in taking final leave of the case, that the "conductor's exchange checks" appended to the application for reargument corroborate the assumption indulged in by the court. They expressly provide that they are good for one continuous passage to place of destination. And plaintiff, having begun his passage thereunder, was bound to continue it, otherwise the check would be invalid.

Application denied.

PASSENGER, EXPULSION FROM TRAIN.—If a mother, with a stopover ticket, boards a train with her child and refuses to pay his fare, both may be ejected at the next station; but the conductor, if he cancels the ticket, must first either pay her its unused value over and above the fares of both for the distance traveled, or give her a stopover check instead of money. If he expels them without doing this, the company is answerable in damages: *Lake Shore etc. R. R. Co. v. Orndorff*, 55 Ohio St. 589, 60 Am. St. Rep. 716, 45 N. E. 447.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

MOORE v. FARMER.

[156 Mo. 33, 56 S. W. 493.]

APPELLATE PRACTICE—EVIDENCE.—The judgment of the trial court in an action at law cannot be reversed on appeal on a question of fact if there is any substantial evidence to support it.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—The title of a riparian owner on a navigable stream extends only to low-water mark, and not to the middle of the stream.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—ISLANDS AND ACCRETIONS.—A riparian owner on the bank of a navigable stream is not, by reason thereof, the owner of an island that springs up in the stream; and if, by accretion to such island, its water margin line unites with the main shore, the new made land becomes part of the island and not of the main land, and the riparian ownership is not thereby extended.

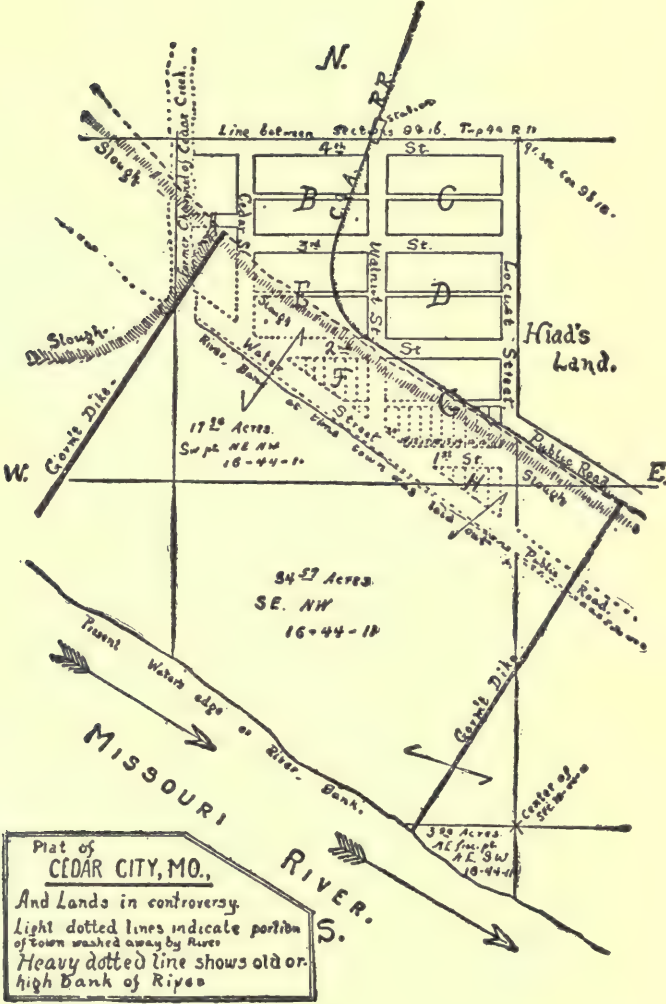
N. D. Thurmond, for the appellant.

D. H. Harris and S. D. Chamberlain, for the respondent.

36 **MARSHALL, J.** Respondent's statement of the facts in this case is as follows:

"This is an action in ejectment brought by appellant Moore in the Callaway circuit court to recover possession of fifty-five and twenty-seven hundredths acres of land in Callaway county, which had formed in the Missouri river south and west of the town or village of Cedar City, and lying across and slightly up the river from Jefferson City. In 1833 all land lying in the northwest fractional quarter of section 16, township 44, range 11, in Callaway county was bought by one W. B. Scott. At that time the river ran over a large part of this quarter section,
37 there being in fact but sixty-nine and fifty-six hundredths

acres of the one hundred and sixty uncovered by the river at this time. Between the date of purchase by Scott in 1833 and the year 1871 the river further encroached upon this land until there was probably not more than forty acres left. In this year all that part of this fractional northwest quarter section lying east of Cedar creek passed into the hands of the Cedar City Land Company, a corporation formed for the purpose of laying out and putting upon the market lands embraced within the original limits of the village of Cedar City. The village was laid out as shown by the plats attached to appellant's and respondent's abstracts—Water street, seventy-five feet wide, ran parallel with the river and so far as the evidence and the plats disclose, the outer or southern line of this street was parallel and coincident with the then north bank of the Missouri river, or at least was as nearly so as the formation and slight irregularities of the bank would permit. Lots facing the river and abutting upon Water street were sold by the town company to various persons. Afterward, but at just what time the evidence does not disclose, the river bank at this point began to wash away until Water street was entirely gone, likewise a considerable portion of the town adjacent thereto, and the river bank had reached the point marked by the heavy dotted line on the following plat:



39 "As far back as 1866 there had been a tow-head or sand-bar out in the river in front or south of Cedar City. In high water this sand-bar or tow-head would be entirely covered with water, but afterward it would appear in the same place, although sometimes changed in outline and extent, but during all this time a considerable portion of the river flowed between this formation of land and the main bank at Cedar City, at one time the main channel being next to the Callaway shore. Between the years 1878 and 1884 the river cut heavily on its north bank at a point some four or five miles up from Cedar City until a union was formed with Cedar creek, the waters of which creek from that time emptied into the river at this point of contact, instead of through its old and former channel which originally formed the western boundary of Cedar City, joining the river at that point. From this time on, the tow-head or sand-bar in front of Cedar City grew more rapidly, caused no doubt by the large amount of soil and debris taken from the bank at the point up the river as above mentioned. In 1884 this tow-head or sand-bar was of such size and definiteness that it was called an island, and in 1885 one R. S. McDonald took possession of it and sowed it in turnips, crossing his teams over to it in a flat boat. From that year to the present time this island has remained a definite body of land, constantly increasing in size, extending its length up and down the river and toward the north or Callaway shore, until now it is separated from the old or former bank of the river in front of Cedar City by a slough or deep depression only. During these years in very high water this island would be submerged, but after the water had gone down, it would reappear, increased in size and higher above the level of the water than it had been before. Land had also begun to form up the river from Cedar City some two or three miles at or near the old Tarleton place, and according to the testimony of some of the witnesses, extended down the river in peninsular form until it joined the land in front of Cedar City, broken, however, 40 by occasional 'reefs' (as they were termed by the witnesses) or channels through which the waters of the river continually flowed.

"In 1892 and 1893 the United States government put in a system of dikes, extending from the Callaway shore out into the river. Two of these dikes are shown on the plat attached hereto. At the time these dikes were constructed the river was unusually high, permitting the government construction

boats to go over the land now in controversy except for a space of some eighty or one hundred feet near the center of the land, at which point the water was too shallow, and where, as testified by some of the witnesses, the land showed dry above the water. At this very time, however, the water was very deep next to the bank in front of Cedar City, ranging in depth from eight to twenty feet, and a portion of the current was continuously running swift and strong between the island and the shore at Cedar City.

"After the dikes had been completed the growth of land out in the river was more rapid and the space between same and the Callaway shore was narrowed by accretions to the bank of the island, until, at the time of the institution of this suit, it was nothing more than a slough or channel through which, however, a small quantity of river water was still flowing.

"In front of Cedar City, and for a considerable distance up and down the river from that point, very little, if any, land has accreted to the main bank on the Callaway side, and the slough or channel which marks the line between the lands formed in the river and the shore is quite close to the old or main bank, ranging in distance from a few feet to as far possibly in some places as one hundred feet.

"From 1885 down to the year 1895, R. S. McDonald was in continuous possession of the lands in controversy, getting his fire-wood and pasturing his cattle there, and fencing it, but it seems the trial court did not consider his possession exclusive as he permitted others to use the lands for the same purpose.⁴¹ In 1895 McDonald quitclaimed his interest in the land to respondent, who then fenced it. In 1896, upon petition of citizens living in the vicinity, and under authority of an act of the twenty-eighth general assembly entitled: 'An act to grant certain lake and river bed lands to the counties in which they are located for school purposes,' and approved April 8, 1895, the county court of Callaway county directed the county surveyor to locate, survey and plat all lands in Callaway county between certain designated lines, formed by the recession from or abandonment of its old or former bed by the waters of the Missouri river. Under this order of the county court the county surveyor located, surveyed and platted about six hundred acres, including the lands now in controversy, the description of which, as contained in plaintiff's petition, is taken from said surveyor's report and plat. Subsequently, all of this land so located and surveyed was sold by Callaway county and the fifty-

five and twenty-seven hundredths acres now in controversy were bought by defendant, he paying three hundred and five dollars, or about six dollars per acre therefor, and a patent from the county was issued to him on the sixth day of May, 1896.

"In 1891, appellant Moore was operating a steam ferry across the Missouri river at Cedar City, and about this time he obtained in consideration of the sum of seventy-five dollars a quitclaim deed from the Cedar City Land Company to lots 11, 12, 13, and 14 in block G in Cedar City and an undetermined interest in certain lands described as 'all of the land south of Cedar City to the bank of the Missouri river, and also all that part of section 16, township 44, range 11, that lies south of and adjoining the land sold by said company to John Haid, thence south to the Missouri river.' At the date of this quitclaim deed a portion of all the lots in block G conveyed to Moore had been washed away by the river, none of them were perfect lots and all of Water street was in the river. The bank of the river at that time, as nearly as can be determined, is indicated by the heavy dotted line on the plat attached hereto. Under this deed Moore did not attempt to exercise any of the rights ⁴² of ownership over nor did he at that time claim any of the land now in controversy, but he did bring an action in the local magistrate's court against McDonald for trespass in using Moore's bank as a landing at a point which McDonald thought was at the foot of Locust street, but which proved to be east of that point and south of Haid's land.

"The land in controversy is all south and west of Cedar City. None of it is south of the Haid land. As shown by the plat of Cedar City, and by the plat above set out, the line dividing the east and west halves of section 16 forms the east boundary line of Locust street in Cedar City, and a south extension of this same line marks the east boundary of the lands in controversy.

"Some time after the sale by the county and purchase by respondent, this suit was brought by appellant to secure possession of said lands. Defendant interposed a general denial of plaintiff's title or right to possession, and affirmatively asserted title in himself by possession for more than ten years and by purchase from Callaway county. Trial was had before the court without a jury."

It is only necessary to supplement this statement with the further remark that, as shown by the testimony and by the plats, there is a slough extending along the whole front of

Cedar City at a point north of what is termed, on the plat above set out, Water street, and which covers parts of lots lying on the north side of Water street, as shown on the plat. This slough separates the land in controversy from the south line of said lots, so that the land in controversy is not joined to the Cedar City land or what was formerly the north bank of the Missouri river, after Water street and the lots abutting it on the north were washed away.

The plaintiff asked and the court refused to give the following instructions:

"1. The court declares the law to be that if the land in controversy was formed by accretion or reliction to the main ⁴³ bank of the Missouri river and that if the land on the bank of said river had been sold by the county for the benefit of the school fund, then the county of Callaway conveyed no title by the sale and deed to defendant under which he claims.

"2. Even though the old bank of the Missouri river washed away, and the river cut in and took away the whole of Water street in Cedar City and encroached upon and carried away some of the lots north of said Water street, yet if said Water street was replaced by accretions to the north bank of said river and the land on the bank thereof was restored and other land was added thereto by the accretions from said river, then the title to said land is in the original owners of the land on the bank of said river or their assignees."

At the request of defendant the court gave the following instructions:

"1. The court instructs that the Missouri river is a navigable stream, and that riparian owners along said river own to the water's edge only—their line expanding as the waters recede and accretions form to the land, and contracting as the waters encroach upon and wash away their land, the line always remaining at the water's edge. But the formation or reliction must be gradual and imperceptible and must be made to the contiguous land so as to change the position of the water's edge or margin. And if it is shown by the preponderance of the testimony in the case that the land in controversy first appeared as an island or formation of soil, sediment or other substances out in the midst of the Missouri river, to which accretions were formed from the deposit of soil and other substances by the waters of said river, until the banks of said island or formation extending northward, united with

the main bank of the river, or was separated therefrom by a slough or depression only, then such lands are not an accretion to the main bank of the river and the plaintiff, Moore, has no title thereto as a riparian owner, and the verdict should be for the defendant.

44 "3. The court instructs that if it is shown by the weight of the evidence that the lands mentioned in plaintiff's petition were formed by the recession from or abandonment of its old or former bed by the waters of the Missouri river, and not by gradual and imperceptible accretions to the main bank of said river, or if it is shown by the weight of the testimony that said lands were originally an island or formation of soil and other substances, which first appeared in the channel of said river, and which was enlarged by accretions thereto caused by the deposit of soil and other substances by the waters of said river until the bank or shore of such island or formation, in extending northward, reached the main or old bank of said river, or was separated therefrom by a slough or depression through which the waters of said river flowed; that then the title to said lands was in the state of Missouri and such title was by said state by an act of the thirty-eighth general assembly of Missouri entitled: 'An act to grant certain lake and river bed lands to the county in which they were located for school purposes,' and approved April 8, 1895, vested in the county of Callaway in said state, and plaintiff has no title to same as an accretion to lands claimed to be owned by him on the banks of said river. And that if said county did by its deed and patent issued by order of the county court of said county bearing date the sixth day of May, 1896, conveying to defendant its said title to said land, then the verdict must be for defendant.

"4. To establish plaintiff's right to the lands in controversy it must be shown by a preponderance of the testimony that such lands are an accretion to lands to which plaintiff has title under his deed of quitclaim from the Cedar City Land Company, and that such accretions are the gradual and imperceptible growth or increase of such land, caused by the deposit of earth, land or sediment thereon by the contiguous waters of the Missouri river; and that at the time of the execution and delivery of said deed to plaintiff by the Cedar City Land Company, the lands 45 mentioned in said deed actually existed and said company was possessed of the fee thereto, otherwise the verdict must be for the defendant.

"7. If there is a public street between plaintiff's lands or lots and constituted the southern boundary line of same, then plaintiff is not entitled as a riparian proprietor to accretions formed on the opposite side of such street and as to all such lands so formed the verdict must be for the defendant.

"9. If the lands in controversy are a part of a peninsula or sand-bar in the Missouri river which first began forming at or near the main bank of said river some two or three miles up the stream from the lands claimed by plaintiff under deed of quitclaim from the Cedar City Land Company, and then by additional formations, broken by occasional sloughs or channels through which the river water flowed, extended down the river until said formation appeared out in the channel of the river in front of and below the waterfront of Cedar City, and that between the lands so formed and Cedar City a considerable current of river water flowed and continues so to flow, and that afterward the lands so formed in front of said town, by accretions thereto, gradually extended its north bank until it had reached the old or high bank of the river in front of said town, but was separated from such old bank by a slough or depression through which river water continued to flow more or less continuously, then such lands so formed in front of Cedar City are not an accretion to the main bank of the river in front of said town and plaintiff has no title thereto as a riparian owner and the verdict must be for defendant."

The court entered judgment for the defendant, and plaintiff appealed.

1. It is plain from the testimony and the instructions refused and given that the trial court found the fact to be that the land in controversy was not an accretion to the main land, ⁴⁶ but was an island, and the accretions thereto, which sprang up in the Missouri river and has not yet become joined to the main land, but is still separated therefrom by a slough. This must have been the finding of fact by the trial court, else that court would have given the plaintiff's instructions and refused those asked by the defendant, for the plaintiff's instructions were predicated upon the fact being that the land is an accretion to the main land while the defendant's instructions proceed upon the theory that the land is an island.

There is evidence sufficient to support the finding of fact that the land is an island, and as this is an action at law, this court will not reverse the judgment of the trial court on a

question of fact if there is any substantial evidence to support it. The fact that this land is an island must, then, be taken as established in this case, and the only matter open to review in this court is the ruling of the trial court upon propositions of law. The fact is, that when the town of Cedar City was laid out by the land company, Water street was the southern boundary of the town, and the north bank of the river. Afterward Water street, the whole of block H, all of block G, except a very small triangle on the northeast corner of lots 11 and 12, and a considerable portion of block E was washed away, and there is a slough now separating this island from the main land which lies north of where Water street formerly was and covers a portion of what formerly was blocks E, G, and H. When the plaintiff purchased from the Cedar City Land Company "lots 11, 12, 13, and 14 in block G, also all land south of Cedar City to the bank of the Missouri river, and also all that part of section 16, township 44, range 11, south of and adjoining the land sold by the Cedar City Land Company to John Haid, thence to the bank of Missouri river," in September, 1890, there was in existence no such thing as lots 13 and 14 of block G, for the slough ran where those lots formerly were, and there was only a small triangle left of lots 12 and 11, lying at the northeast corner⁴⁷ of block G. There was no land south of Cedar City, except this island, which, as before stated, is not connected with the main shore.

The plaintiff's claim rests entirely upon the proposition that this land is an accretion to the main land, while defendant's contention is that this land is an island which has never become joined to the main land. In *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100, this court held that the title of a riparian owner extended only to low-water mark, and not to the middle of the stream, as is the law in Illinois and in some other jurisdictions; that the riparian owner must stand the loss of land washed away by the encroachment of the river and as a correlative right is entitled to the gradual and imperceptible accretions which are joined to his land, but that he has no right to an island which springs up in the river, and that "if by accretions to such island the water margin should unite with the shore, the new made land would become a part of the island and not of the main land, and the riparian ownership would not be extended. It is so held in *Buse v. Russell*, 86 Mo. 209, and *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589. It makes no

difference in principle that the islands in these cases have been surveyed and disposed of by the United States. The riparian owner would not take the accretion for the reason that it was not added to his own land." In Cooley's case, the island had become joined to the shore, and it was held that the plaintiff, the riparian owner, was only entitled to so much as was an accretion to his land, but not to the island or so much as was an accretion to the island.

The plaintiff in this case recognizes that if Cooley's case, and the prior cases upon which it was based, is to be followed, the judgment of the circuit court is right, but he urges this court to follow the common law as the Illinois courts have done, and hold that the riparian owner's title extends to the center of the thread of the main channel, and hence he is ⁴⁸ entitled to all land, whether accretions or islands, that forms opposite his land and on his side of the river.

The decision in Cooley's case was not reached hastily or unadvisedly. It was decided by the court in Bank, and all the judges concurred, except Brace, J., who dissented in a most masterful opinion, presenting the same view now advocated by the plaintiff herein, and except Barclay, J., who expressed no opinion. Cooley's case follows the prior decisions of this court, and in consequence of that decision, holding the title to islands formed in a river to be vested in the state, the general assembly passed the act of 1895 (Acts 1895, p. 207) granting the state's title to the counties within which such islands formed.

This question has again undergone interpretation in the case of *McBaine v. Johnson*, 155 Mo. 191, 55 S. W. 1030, and Cooley's case was followed. In *McBaine's* case it was pointed out that the supreme court of the United States in *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, had held that "grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the state in which the lands lie. It depends upon the laws of each state to what extent the prerogative of the state to lands under water shall extend." It was further noted in *McBaine's* case that the supreme court of the United States had held in *Barney v. Keokuk*, 94 U. S. 324, "that it is for the several states themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which belong to them, in their sovereign capacity, it is not for others to raise objections."

The questions must, therefore, be considered settled in this state by the adjudications of the courts and the legislative acceptance of judicial interpretation.

It follows from these principles that as the land in controversy is not an accretion to the riparian owner's land, but is ⁴⁹ an island that sprang up in the river and the accretions which have formed to the island and not to the riparian owner's land, the plaintiff has no title thereto, but the title passed from the government of the United States to the state of Missouri, and from the state of Missouri to Callaway county, under the act of 1895, and to the defendant by the patent from Callaway county.

For these reasons the judgment of the circuit court is affirmed.

All concur, except Brace, J., not sitting.

RIPARIAN OWNERS ON A NAVIGABLE STREAM HOLD only to the water's edge: *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592. Compare *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 72 Am. St. Rep. 269, 55 N. E. 184; and see the monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56-63.

ACCRETIONS TO AN ISLAND BELONG to the owner thereof, even though the island is increased in size thereby so as to join the main land: See the monographic note to *Bellefontaine Imp. Co. v. Niedringhaus*, 72 Am. St. Rep. 282, 283.

BISHOP v. CHASE.

[156 Mo. 158, 56 S. W. 1080.]

NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH QUALIFICATION—DEFENSES.—The transfer of a negotiable note before maturity for value, by pinning to the note a written paper setting forth a qualified indorsement, when there is ample space upon the note for the indorsement, is not sufficient to invest the transferrer with all the rights of a bona fide purchaser. Such indorsement is a mere assignment, and the note in the hands of the assignee without knowledge of its payment, before the transfer, is subject to all the equities of a non-negotiable instrument, or such as it would have been subject to in the hands of the original payee.

NEGOTIABLE INSTRUMENTS—QUALIFIED INDORSEMENT—DEFENSE OF PAYMENT.—The transferee of a negotiable mortgage note taken by qualified indorsement amounting to no more than a mere assignment, although transferred before maturity and for value, takes it and the mortgage incident thereto subject to all defenses thereafter available against it by the payor or mortgagor, one of which is payment, and such defense is available to the purchaser from the mortgagor. A sale of the property by such

transferee of the note under the power contained in the mortgage is void if made after the payment of the note.

EXECUTORS AND ADMINISTRATORS — ESTOPPEL AGAINST DEVISEES.—If an executor purchases land for the estate, and is subsequently removed by the devisees, after which a final settlement is made between the executor and devisees, in which the former is not credited with the purchase of the land, but the purchase price thereof is included in other debts due the estate by such executor for which execution is obtained against him and his sureties and satisfied, the devisees are thereby estopped to claim any interest in the land.

A. F. Evans and F. F. Brumback, for the appellants.

Powell & Powell, W. Adams, and R. H. Field, for the respondents.

163 BURGESS, J. This is a suit in equity by plaintiffs to set aside a trustee's sale of a small tract of land in Kansas City, Missouri, made by defendant O'Neill, sheriff, and trustee under a deed of trust on said land, executed by J. T. Chambers and his wife Othelia on the nineteenth day of April, 1889, to Samuel Foster, trustee, for the use and benefit of Charles R. Hicks, to secure the payment of a promissory note for the sum of \$3,700, dated on the seventeenth day of April, 1889, due three years after its date and executed by said Chambers and wife to said Hicks.

In 1878 one John Jones died testate in Ohio possessed of real and personal property in Jackson county, this state. He left surviving him as his only heirs at law two children, viz., Mary E. Bishop and Edward J. Jones. By this will, which was duly admitted to probate in said county, the testator named Charles W. Chase as his executor, who thereafter qualified as such. By his will the testator directed his executor to sell all of his real estate, and after paying some bequests to invest the balance of the proceeds in unencumbered real estate, the interest and profits arising from which was to be divided equally among his two children during their natural lives. The investments were to be made in Kansas City property.

The executor sold the land as directed by the will, realizing therefrom something over \$22,000. He then began negotiations with Matt. H. Crawford for the purchase of the land in litigation, for which the latter asked \$5,000.

It had formerly been owned by said Chambers and wife, from whom Crawford derived title, and while they owned it they had placed upon it the deed of trust under which it was sold at trustee's sale, at which defendant Arnold became the pur-

chaser. In the negotiations between Chase and Crawford for the purchase of the land it was developed that it ¹⁶⁴ was encumbered by said \$3,700 deed of trust, and they went to Hicks to whom the note was executed to see what could be done about it. Hicks had negotiated the note, and did not have it in his possession, but promised to get it back, and thereupon Chase by his individual check paid \$3,852.11, the amount of the note and four coupon notes then due, and two per cent commission thereon to Hicks. At the same time Hicks made out in the name of Hicks & Foster (of which firm he was a member) and delivered to Crawford the following receipt:

"\$3,852.11.

Kansas City, July 22d, 1890.

"Received of M. H. Crawford, Esq., three thousand, eight hundred and fifty-two and 11-100 dollars to pay loan No. 211 made April 17th, 1889, by J. T. Chambers and wife on north 32 1-2 feet of south 65 feet lots, 1, 2, 3 and 4 (except 5 feet off lot 4) block 3, Jas. Goodin place which is to be delivered within ten days.

HICKS & FOSTER."

About August 1, 1890, the \$3,700 note was returned to Hicks, and he then indorsed and delivered it and the coupon notes to Chase, and by the terms of the indorsement, made the notes payable to the order of Chase without recourse upon him, Hicks. Hicks testified that he had no knowledge that Chase was executor of Jones, or that the money paid him belonged to the Jones estate.

On September 16, 1890, Chase borrowed from the defendant Lahme \$1,000, and to secure its payment executed to him his note for that amount due one year after that date, and as collateral security thereto delivered to him the note for \$3,700 and executed and delivered to him the following instrument of writing:

"Kansas City, Mo., September 16, 1890.

"The attached note (with deed of trust accompanying) for \$3,700 dated Kansas City, Mo., April 17th, 1889, due 3 years from date signed by J. T. Chambers and wife is ¹⁶⁵ placed as collateral security with Adolph Lahme for payment of my note of \$1,000 due in one year from date.

"C. W. CHASE."

At the same time Chase took the \$3,700 note of Chambers and wife, a blank letterhead of H. C. Kumpf & Son, the above collateral agreement written upon a letterhead of H. C.

Kumpf & Son, and the \$1,000 note, and placing them one on top of another in the order as set out above counting from the bottom, attached them all four together by a pin through the upper left-hand corner and delivered them to Lahme.

Six years passed by. During this time Chase made two payments of interest to Lahme on the \$1,000 note, the payments being made in 1892 and 1893.

In March, 1896, Lahme requested respondent O'Neill, who was sheriff of Jackson county, to act under the power in the Chambers deed of trust and sell the land, the trustee Foster having left the state. The sheriff, acting under the power and in regular manner, proceeded to advertise and sell the land on March 30, 1896.

While there was room on the \$3,700 Hicks note to have written the collateral contract, given to Lahme, there was not sufficient room on the coupon notes to have written the same. The collateral agreement was put on another piece of paper and pinned to the notes because it was more convenient to do it that way.

Lahme testified that he loaned the \$1,000 to Chase through George Kumpf, who was acting for Chase, and that he took the notes in question without any knowledge of any lack of title in Chase to the \$3,700 notes and coupons, or that it was paid, or that there was any claim that it had been paid, and that he took this note on the strength and validity of the same as the property of Chase and as security for such loan.

This evidence of Lahme was undisputed by any witness ¹⁶⁶ in the case, and the undisputed evidence of George Kumpf was that the loan of \$1,000 was made and the security taken by Lahme before the maturity of the \$3,700 Hicks note or the coupons attached thereto, and without any knowledge on his part that the last-named note had been paid, or was claimed by anyone to have been paid, and with the thought that the bond was straight as it appeared on its face.

Attorney Evans testified that he, acting for the plaintiffs, learned from Chase of the alleged payment by Chase of the \$3,700 note as long ago as September or October, 1890, and then demanded of Chase this note but failed to get it. Between four and five years after the transaction aforesaid between Chase and Lahme, and after attorney Evans, representing the plaintiffs, had first learned of the alleged payment of the \$3,700 note out of the funds of the Jones estate, and after he had tried and failed to get this note from Chase, these

plaintiffs caused Chase's settlements as executor to be set aside and him to be removed as executor and his account as executor of the Jones estate to be examined, and recast, and through their attorney's efforts a judgment for \$18,198.81 to be obtained in the probate court, in favor of Seehorn, the administrator de bonis non of the estate, against Chase and his sureties in said estate, including therein as a credit to Chase the purchase price of the property, including the \$3,700 note involved in this suit.

This judgment of the probate court against Chase and his sureties for \$18,198.81 was obtained on January 20, 1896, and included the \$5,000 purchase money of the property in question and \$1,316.65 interest thereon, and Chase was expressly charged in said judgment with having used said \$5,000 for his own private uses, and no credit therefor from said estate was there or elsewhere allowed to Chase.

Next following the charges in the settlement aforesaid in the probate court between Chase, executor, and Seehorn, ¹⁸⁷ administrator de bonis non of the estate of John Jones, of January 20, 1896, is the following finding entered then and there by the probate court: "And the court further finds that the executor has made no investment in real estate in compliance with the terms of the will for the benefit of the devisees."

Not until after all the foregoing events, nor until on the thirtieth day of March, 1896, the time the property in question was offered for sale and sold by Sheriff O'Neill, as trustee, to defendant H. Clay Arnold, for \$1,700 (paid by Arnold) does the evidence show that the plaintiffs sought to avail themselves of a claim of title to the \$3,700 note, or to the claim made at the trustee's sale and in this suit, that it had been paid for them by Chase. But on that day plaintiffs appeared at the sale by attorney and before the sale began gave a full and elaborate notice of all the circumstances connected with the transaction and of their claim that the sale would be invalid because the \$3,700 note had been paid. This action was begun April 3, 1896. Since it was begun execution was on July 14, 1896, duly issued on the judgment aforesaid and the lands of A. J. Pierce, one of Chase's sureties, were, on August 10, 1896, sold thereunder by the sheriff to Seehorn as administrator of the said estate, and after this the plaintiffs joined Seehorn in a suit in equity, against alleged fraudulent grantees of said Pierce, to establish the title thereto in Seehorn. Afterward,

to wit, November 11, 1896, the judgment of the probate court aforesaid was credited with one-half of the amount then due thereon, to wit, \$9,418.50.

The consideration for this credit was \$2,400 cash paid and a deed of property from Mrs. Pierce (wife of one of the sureties) to T. J. Seehorn, administrator de bonis non of the Jones estate, also a deed of property from Mrs. Pierce to Mr. A. F. Evans (for his fee for services to the Bishops and Seehorn against Chase and his sureties) of estimated value of ¹⁶⁸ \$11,000 or \$12,000, making in all about \$14,000 given up by Mrs. Pierce for the credit aforesaid and release of her husband's estate from Chase's bond. The plaintiffs participated in this settlement, too, by giving quitclaim deeds to Mrs. Pierce of certain of the lands purchased by Seehorn under his judgment aforesaid.

There was no tender made by plaintiffs, either in the pleadings or at the trial, to Lahme of the amount of his note nor to Chase of any credit on the judgment of the probate court against him of the amount of the purchase money of lands in question and interest thereon charged to him and included in said judgment. And Seehorn is neither a plaintiff nor defendant in this case, though he is still acting as administrator of the estate.

The court found for defendants, establishing the title to the land in Arnold and directed the sheriff as trustee to make him a deed for same, directing payment by sheriff out of the \$1,700 paid by Arnold, of first, the sheriff's costs and expenses, and the balance to the receiver, who out of the total in his hands was to pay: 1. His costs and expenses; 2. The amount due Lahme on his \$1,000 note; 3. The amount due Kumpf on his garnishment; and 4. The balance to respondent Pierce, and rendered judgment against appellants for costs. Plaintiffs appeal.

It is claimed by plaintiffs that the \$3,700 note made by Chambers to Hicks was paid off and the debt extinguished July 22, 1890, long before the sale of the property in question under the deed of trust thereon which was given to secure its payment. Chase, the executor, who had been negotiating with Crawford, who owned the equity, for the purchase of the property for the plaintiffs, refused to purchase it unless a clear title could be obtained, and to that end he and Crawford called upon Hicks at his office, when Chase for the Jones estate paid the amount of the note and ¹⁶⁹ coupons then due, including interest, whereupon Hicks gave Crawford a receipt which recited

that the money was received by Hicks to pay a loan, which manifestly had reference to the note. Crawford testified that Chase said to him, during their negotiations for the purchase by Chase of the property, and also at the time of the delivery of the deed to him, and on the payment of the consideration, that he was purchasing the land for the grantees named in the deed, under the terms of the will of John Jones, deceased, and out of moneys held by him as executor of his will.

There was no testimony which tended to show to the contrary, except the giving by Chase of his individual check in payment for the debt, the assignment by Hicks to him individually of it, and that it was a sale of the note and not its payment. But the evidence, when considered in the light of surrounding circumstances, the purpose for which Chase was buying the land, that he would not take it unless the encumbrance upon it was removed, that the money paid for the purchase belonged to the Jones estate, shows beyond any and all question that the money paid by him to Hicks on the debt was in satisfaction of, and an extinguishment of, it. Any other position is utterly inconsistent with his refusal to buy the land from Crawford, unless part of the purchase money went to the extinguishment of the Hicks debt, and the satisfaction of the deed of trust given to secure its payment. Moreover, Chase did not answer the petition, and in so far as he is concerned, the allegations in it must be taken as confessed. We therefore hold that the debt was paid off before the day of sale by the trustee.

But notwithstanding this fact, as the note was a negotiable note, and indorsed to Chase before due, if it was thereafter, and before it became due, indorsed for a valuable consideration in the ordinary course of business to the defendant Lahme, he was not affected by its payment, and the sale under the deed of trust was valid. Plaintiffs, however, contend ¹⁷⁰ that there was no indorsement of the note, that it was merely assigned to Lahme, and that in such circumstance he took only the title of Chase, and subject to all equities against the note that existed against it in his hands.

It is well settled that a note, although negotiable in its character, if transferred without indorsement, is open to all the equities of a non-negotiable instrument, or to such as it would have been subject to in the hands of the original payee: *Patterson v. Cave*, 61 Mo. 439, and cases cited; 1 *Daniel on Negotiable Instruments*, 3d ed., secs. 321, 573, 644; *Quigley v.*

Mexico Southern Bank, 80 Mo. 289, 50 Am. Rep. 503; Weber v. Orten, 91 Mo. 677, 4 S. W. 271.

But defendants insist that when the transfer of a negotiable note before due for value is accompanied by a written paper pinned to the note setting forth a qualified indorsement of it, as in this case, this is a sufficient indorsement of the note to invest its transferee with all the rights of a bona fide purchaser, the same as if the indorsement had been written upon the note itself.

As a general rule, an assignment of a negotiable instrument must be indorsed upon it, that is, written upon its back, but there is an exception to this rule when the back of the instrument is so covered as to make it necessary, then "an extra piece of paper may be tacked or pasted on the instrument, and all further indorsements may be written on the attached paper": Tiedeman on Commercial Paper, sec. 264; 1 Daniel on Negotiable Instruments, 4th ed., sec. 690.

In *Folger v. Chase*, 18 Pick. 63, it was held that an indorsement written on a slip of paper, which was attached to the back of a note by a wafer, for the purpose of writing receipts of partial payments thereon, there not being room on the back of the note, was sufficient, the indorsement having been made after several of such receipts had been written on such attached paper.

And in *Crutchfield v. Easton*, 13 Ala. 337, it was held that an indorsement of a bill or note is generally made by the ¹⁷¹holder writing his name upon the back thereof, but that indorsements, made on a piece of paper, attached to the bill, called an allonge, are frequent: Chitty on Bills, 13th Am. ed., 257.

In the case of *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. 17, one William Golightly executed and delivered a mortgage on land which he then owned to one James Blackburn to secure the payment of two promissory notes, one for the sum of \$500, and the other for \$10, each bearing ten per cent interest from date, and due in one year. The smaller note was attached to the other with paste, and on the back of it (the \$10 note) was pasted a slip of paper, on which was written an assignment of the notes from Blackburn to Louise Golightly, and thereafter an assignment of them by her to Mary E. Bookstaver. It appeared from the notes copied in the bill of exceptions that many indorsements of payments of interest had been made prior to the date of the assignment to Bookstaver,

and that fact, in the absence of all proof to the contrary, was held to be sufficient to warrant the conclusion that the backs of the notes were covered, and that the "allonge" or additional piece of paper was necessarily attached in order to make further indorsements on the same.

In passing upon a similar question in *Osgood v. Artt*, 17 Fed. 577, it was said: "As a general rule, the legal title to negotiable paper, payable to order, passes, according to the law merchant, only by the payee's indorsement on the security itself. The only established exception to this rule is where the indorsement is made on a piece of paper, so attached to the original instrument as, in effect, to become part thereof, or be incorporated into it. This addition is called, in the adjudged cases and elementary treatises, an allonge. That device had its origin in cases where the back of the instrument had been covered with indorsements, or writing, leaving no room for further indorsements thereon. But, perhaps, an indorsement upon a ¹⁷² piece of paper, attached in the manner indicated, would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument."

The case of *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720, goes further, and holds that an indorsement or transfer of a promissory note may be on another paper attached to and made a part of the note, and that it is not essential to a transfer of a note by this method that there should have been a physical impossibility of writing the indorsement or transfer on the note itself, but it may be on another paper attached to the note, whenever necessity or the convenience of the parties requires it.

But the courts of Iowa, Illinois, and Nebraska have all refused to follow that case. In *Franklin v. Twogood*, 18 Iowa, 515, the Racine and Mississippi Railroad Company received a negotiable note payable to itself. Before the maturity of the note, the railroad company executed its bond payable to ——— or bearer for a certain sum, and ——— as collateral security for the bond it assigned and transferred the note, describing it. The railroad company attached the bond, note and mortgage securing the same, which were attached together by eyelets, and sold them before maturity to an innocent holder, who sued upon the note. The suit was defended upon the ground that the note was without consideration, but plaintiff claimed that the bond being attached to the note amounted to an indorsement, and that the bond was merely an allonge. The

court held that the note had not been indorsed, that the bond was not an allonge, and that the defense was good. This case, *Franklin v. Twogood*, was before the supreme court of Iowa again in 1868, 25 Iowa, 520, 96 Am. Dec. 73. It was then urged that the contract was a Wisconsin contract, and having been construed by the highest court of the state in *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720, that its ruling should be followed. But the Iowa court refused to do so, and held to its former ¹⁷³ ruling. In 1865, a case upon the same series of bonds and notes issued by the Racine and Mississippi Railroad Company came before the supreme court of Illinois in *Peck v. Bligh*, 37 Ill. 317, in which the doctrine announced in *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720, was repudiated, the court holding that the attached bond was not an indorsement. The same rule was announced by that court in the subsequent case of *Haskell v. Brown*, 65 Ill. 29.

In *Doll v. Hollenbeck*, 19 Neb. 639, 28 N. W. 286, the mortgage and note were not attached or fastened together, but there was plenty of room on the back of the note for indorsements. The court observed that "it would be a forced and inadmissible construction to treat the mortgage as an allonge of the note," and in express terms refused to follow *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720.

In the case at bar, there was plenty of room upon the back of the note to have made the indorsement, and the only excuse for not doing so was that it was more convenient to assign it on a separate paper, which defendants insist was a sufficient indorsement of the note to invest Lahme with all the rights of a bona fide purchaser, the same as if the indorsement had been written on the note itself. But this position is not sustained by a single authority which we have been able to find except the case of *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720, and that has been repudiated by the highest courts of the states before mentioned. All of the authorities with the exception of that case are the other way, and we must in accordance therewith hold that the transfer of the note to Lahme was not by indorsement, and, although before maturity, he took it and the mortgage which was incident thereto subject to all defenses that would have thereafter been available against it by the payor, one of which was its payment: *Whitehead v. Waller*, 10 Mees. & W. 695; *Wheeler v. Barret*, 20 Mo. 573; *Ford v. Phillips*, 83 Mo. 523; *Kellogg v. Schnaake*, 56 Mo. ¹⁷⁴ 136; *Weber v. Orten*,

91 Mo. 677, 4 S. W. 271; *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157; *Julian v. Calkins*, 85 Mo. 202.

It is, however, said that plaintiffs are strangers to the note and to its alleged payment, if made, and cannot for that reason have any advantage therefrom. While we recognize the rule to be that, where a negotiable note is transferred after it becomes due, the assignee takes it subject only to such equities and defenses as are connected with the note itself and not to such as arise out of collateral transactions as held in *Kelly v. Staed*, 136 Mo. 430, 58 Am. St. Rep. 648, 37 S. W. 1110, and *Hunleth v. Leahy*, 146 Mo. 408, 48 S. W. 459, it would be stretching that doctrine to an unwarranted extent, and without any authority or reason therefor, to hold that the owner of a tract of land subject to a mortgage which existed thereon prior to the acquisition by him of title thereto could not, when the mortgage is attempted to be foreclosed, show that the debt whose payment it was given to secure had been paid off and satisfied.

At the time Chase placed the note with Lahme as collateral security for the \$1,000 loan, it had been paid off, and as it was not regularly indorsed to him, he took it subject to that defense although he paid a valuable consideration therefor.

In *Kernohan v. Durham*, 48 Ohio St. 1, 20, 26 N. E. 982, in speaking of this species of property it is said: "This species of property, when purchased overdue from one who is not the real owner, and has no authority to sell, is thus placed in the same class with other goods, and made subject to the well-recognized rule that if the seller was not the owner, and had no authority from the owner to sell, the buyer will have no title whatever to the property he has bought, as against the true owner, although purchased in the ordinary course of trade. . . . Buying the paper after it is dishonored, the purchaser who, when put on his guard, does not seek the knowledge which he might obtain by using reasonable diligence, cannot complain, if the law charges him ¹⁷⁵ with constructive notice of such infirmity of title as attaches to the instrument in the hands of him from whom he acquired it, and permits him only to stand in the shoes of his vendor or indorser. Nor is the indorsee or purchaser after maturity placed in such situation only as regards equities that may exist between the maker of the note and the payee who indorsed or transferred the instrument. It is held in England that, if there be an equity attaching directly to the bill or note itself, it may be asserted against

an indorsee after maturity, by a third party who claims the right to follow the bill. And Mr. Daniel, in his work on Negotiable Instruments, section 726b, says: "If the equity be a claim of some right to the instrument directly attached to it, we perceive no good reason why it may not be asserted against an indorsee after maturity, by any party whatsoever."

In *Fisher v. Leland*, 4 Cush. 458, 50 Am. Dec. 805, the court uses this language: "But where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, Why is it in circulation—why is it not paid? Here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defense, such as setoff, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defense which would be made if the suit were brought by the indorser. The note does not cease to be negotiable; the indorsee takes a title, and may sue, but he is so far in privity with his indorser that he takes only his title; and if the defendant could make any defense against a suit brought by such indorser, he could make it against the indorsee. This rule is settled, in the case of a suit by an indorsee taking the note overdue, by a series of authorities, which show not only that such defense may be made, but that it may be proved by the same evidence by which it might have been proved if ¹⁷⁶ the indorser were plaintiff, to wit, the admissions of such indorser, made whilst he was the holder."

In *Appledorn v. Streeter*, 20 Mich. 9, it is held that the payment, after maturity, of a promissory note secured by a mortgage, by a party who had acquired the mortgagor's title to the mortgaged premises by conveyance expressly made subject to the mortgage, extinguished the note; and if it be afterward put in circulation no recovery can be had upon it.

From what has been said it necessarily follows that Lahme occupies precisely the same attitude toward the \$3,700 note and mortgage that Chase did at the time he placed it with him as collateral security, and as it was paid at that time he acquired nothing by its placement with him.

But it is argued by defendants that plaintiffs elected through their attorney and Seehorn, administrator in charge of the estate of their father, not to allow Chase a credit of the \$5,000 for the purchase of the land and the \$3,700 note in question and to have the probate court charge him with \$1,316.65, in-

terest thereon in the final settlement between Chase and Seehorn, and that this was an abandonment for the estate (including plaintiffs) of any claim of title to the land and note in question, a satisfaction of the purchase and assignment made by Chase of the note in question, and ipso facto vested the title to the land and note in Chase, or his assigns irrevocably. It is true that when Chase's final settlement was set aside, the entire administration of the estate was reopened. And after his removal and his successor Seehorn was appointed, it was his, Seehorn's, duty to move the court to compel Chase to make final settlement and on such motion after due notice to him to ascertain the amount of money, the quantity and kind of real and personal property, and all the rights, deeds, evidences of debt and paper of every kind of the testator in the hands of the executor Chase or that came into his hands, and remained unaccounted for at the time of his removal: Rev. Stats. 1889, sec. 48. ¹⁷⁷ These requirements were complied with by Seehorn, the probate court, and Chase, but Chase was not allowed in this settlement credit for the \$5,000 invested by him as executor in the land.

The probate court had the unquestionable right as between Seehorn and Chase to refuse him credit for this money, whether the plaintiffs were present or not. All of Chase's indebtedness to the estate, including this \$5,000, was included in his final settlement, upon which he was found to be indebted to the estate in the sum of \$18,198.81, for which judgment was rendered against him and his sureties upon his bond as executor.

By charging Chase with this money, Seehorn, the administrator, elected to hold him responsible in his official capacity therefor. Plaintiffs were represented in this settlement by attorney who had control of the proceeding therein, and they must be held to be bound thereby.

Moreover, in confirmation of the settlement made between Seehorn and Chase by the probate court, plaintiffs, by their representative Seehorn, had the lands of A. J. Pierce, one of Chase's sureties, sold under execution in favor of himself as administrator of Jones, bought it in, and subsequently joined Seehorn in compromising the liability of Pierce's estate (he having deceased) upon the judgment against him, in the exchange of deeds for their use and benefit for property purchased by Seehorn under said judgment.

Plaintiffs had the right to claim the benefit of the payment of the \$3,700 debt on the land and the extinguishment of that

encumbrance by Chase, or to proceed against him and his sureties upon his bond as executor for the money, but could not do both, and the administrator having recovered judgment against the executor and his sureties for this and other moneys of the estate misappropriated by him in the sum of \$18,198.81, and realized therefrom for the benefit of ¹⁷⁸ plaintiffs, the only heirs, the sum of \$9,418.50, our conclusion is that they should be estopped by their election to proceed against Chase and his sureties upon his bond, that course being inconsistent with the remedy pursued in this cause.

For these considerations we affirm the judgment.

Gantt, P. J., concurs.

Sherwood, J., absent.

ALLONGE.—AN INDORSEMENT of a negotiable note may be made on another paper attached to and made a part of the note, and called an allonge, whenever such indorsement is required either by necessity or convenience, and it is not necessary that there be a physical impossibility to write the indorser's name on the original paper: *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720. See, too, *McLaren v. Watson*, 26 Wend. 425, 37 Am. Dec. 260.

THE ASSIGNEE OF A NEGOTIABLE NOTE acquires no better title than had the payee: *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829. If a note is assigned by a separate writing, the title is transferred, but the assignee is not entitled to the rights of a bona fide purchaser of negotiable paper transferred before due: *Gaylord v. Nebraska etc. Bank*, 54 Neb. 104, 69 Am. St. Rep. 705, 74 N. W. 415.

LACLEDE NATIONAL BANK v. RICHARDSON.

[156 Mo. 270, 56 S. W. 1117.]

TRUSTS AND TRUSTEES—POWER OF SALE—NOTICE.—

A trustee exercising a power of sale not prescribing the manner of its execution must give definite notice as to the time, place, and terms of sale, the authority under which it is to be made, and the property to be sold must be described with sufficient particularity to identify it and to invite competition.

TRUSTEES — SALES — INADEQUACY OF PRICE — ADJOURNMENT.—A trustee, in exercising the discretion with which he is charged in executing a power of sale vested in him, should adjourn the sale if only a few bidders are present, the weather is inclement, and the sum offered grossly inadequate to the value of the property, unless there is an express prohibition in the instrument creating the power against such adjournment of the sale. A

failure under such circumstances to adjourn the sale is ground for setting it aside.

APPELLATE PRACTICE.—POINTS NOT PRESENTED and passed upon by the trial court cannot be considered on appeal.

Hornsby & Harris, for the appellant.

R. M. Nichols, for the respondent.

275 ROBINSON, J. The Laclede National Bank of St. Louis presented to the probate court of the city of St. Louis, for allowance against the estate of J. H. Simpson, deceased, its claim based upon two promissory notes made by the deceased in its favor, dated, respectively, February 6, and February 15, 1893, payable to the order of the bank, and due ninety days after date, each for the sum of twenty thousand dollars. These notes are in the form of what is known as "collateral notes," containing provisions whereby certain personal property is pledged as security for their payment, with power to sell such security in event of nonpayment of the notes, and contain the following power of sale: "In default of payment of this note at maturity I hereby authorize said Laclede National Bank, or any of its officers, to sell said collateral at public or private sale, or otherwise, at its option, without notice, and to apply the proceeds to the payment of this note, with all damages, interest, charges and costs. Said Laclede National Bank of St. Louis shall also have the right at any such sale to bid for or purchase said pledged property, or any part thereof, in its own name, and for its own use and benefit." The property mentioned in these notes, as pledged for their payment respectively, was numerous promissory notes secured by several deeds of trust on real estate. Some of these deeds of trust, so pledged, were first liens on the real estate therein described, while others were second, and **276** still others third, liens. It seems that Simpson during his lifetime was a regular customer of the bank, keeping a deposit there, and that in the course of his dealings with the bank the latter made these loans, taking the notes and deeds of trust as security therefor, and held them at the time of Simpson's death, which occurred on February 23, 1893. After the death of Simpson, the bank employed one F. W. Mott, a real estate broker, to take charge of and attend to the collection of the collaterals in question, placing the entire matter in his hands for the purpose of realizing on them. During the following year Mott succeeded in collecting about fifteen thousand dollars, and thereupon the bank concluded to

sell the collaterals remaining uncollected at public sale under the power contained in the notes in question, and directed Mott to proceed accordingly. On February 16, 1894, written notice was served on defendant Richardson, public administrator in charge of the Simpson estate, that the bank would on the nineteenth day of February, at 11 o'clock A. M., sell at public sale all the Simpson securities remaining uncollected, at the east front door of the courthouse in the city of St. Louis. This notice contained a description of the collaterals to be sold and was signed by the bank itself. A notice of sale to occur at the same time and place was also published in the St. Louis "Daily Post-Dispatch" on the fifteenth, sixteenth, seventeenth, and eighteenth days of February. This notice, like the former, contained a description of the collateral securities to be sold, with reference to the book and page of the record of the deeds of trust securing the same, and was signed by "F. W. Mott, agent." The opening paragraph in this notice is in the following words: "Notice is hereby given that the undersigned will, at the east front door of the courthouse in the city of St. Louis, Missouri, on Monday, February 19, 1894, at 11 o'clock, sell for the benefit of whom it may concern the following described promissory notes"; here follows a description of the securities remaining unpaid, formulated in the ²⁷⁷ manner above indicated. At the time fixed for the sale the president of the bank, Mr. Hoffman and his attorney, J. S. Hornsby, together with Mr. Mott, the agent of the bank, and those in attendance at the sale congregated just immediately outside of the east front door of the courthouse, and the weather being cold and disagreeable it was suggested that those present repair to the inside of the glass storm doors at the entrance, where it would be more comfortable. These doors are temporarily placed at the entrance of the courthouse during the winter season, and are glazed for a distance of about three feet from the bottom. The printed notice of the sale, as published in the "Post-Dispatch," was then read by Mr. Mott, and there, out of view of the passing public, the collateral securities were offered for sale by him, and were all ultimately bid in by the bank at the grossly inadequate sum of eight thousand eight hundred and twenty-five dollars, far below their actual cash value. There were only three or four bidders at the sale, which was conducted by Mott as agent and lasted about thirty minutes. The face value of the collateral notes sold by Mr. Mott amounted to upward of forty thousand dollars. The testimony is conflicting as to the

number of persons present at the sale, some witnesses fixing the number present at fifteen, while others testified that the attendance did not exceed six at the outside. The information given at the sale was very meager. The defendant's attorney, R. M. Nichols, who was present at the sale, on being asked by Mr. Hoffman, president of the bank, if he had anything to say about the sale, replied, in substance, that he objected to the sale being made under the circumstances, but would make his objections to the court thereafter. Previous to the advertisement of the sale there had been several interviews between the president of the bank and Mr. Nichols, on behalf of the administrator, touching the collaterals held by the bank, in which it was agreed that the administrator and the bank should act in harmony in collecting these collateral ²⁷⁸ notes, and that the balance collected, after paying the bank, if any, should be turned over to the administrator. As the result of such interviews, Mr. Nichols testified that he was induced to believe that the bank would not exercise the right to sell given in the collateral notes. After giving the estate credit for the amount for which the securities were sold the bank presented its claim against the estate to the probate court of the city of St. Louis for the balance claimed to be due on the collateral notes, which claim was by the probate court allowed for twenty-one thousand seven hundred and four dollars and sixty-six cents, with interest at the rate of eight per cent and placed in the fifth class of demands. Thereupon defendant duly appealed to the circuit court, and the cause having been referred to A. N. Crane, to try all the issues, the referee decided that the sale of those securities so made by Mott under the power contained in the collateral notes was void, and required the bank to account for all the notes purchased by it at such sale, finding in favor of the bank only for the amount remaining due after said accounting. The bank filed exceptions to the referee's report, which were overruled by the circuit court, and the bank brings the case here by appeal.

It is conceded that under the power contained in the Simpson notes the bank had authority to sell the securities held by it either at public or private sale. The only question, therefore, presented by this record for adjudication is the validity of the public sale of the sundry notes and deeds of trust held by the bank as security for the loan in question. The referee declared the sale invalid because the printed notice of the sale did not state upon what authority or by virtue of what power

the sale was to be made, no reference whatever having been made to the pledge or power under which Mott was acting in making the sale, nor was any mention made of the ownership of the collaterals, nor was it stated upon what terms the sale would be made, whether for cash or on time; besides there was nothing in the published notice ²⁷⁹ indicating that the sales of these securities was made in behalf of the bank. And further, in view of the character and number of the securities sold and the manner in which the same were secured, the four days' advertisement was inadequate in point of time to enable prospective purchasers to examine into the value of the securities to be sold.

That the bank held these securities in trust is undoubted. It therefore became the imperative duty of the bank, in exercising the rights conferred by the power of sale contained in the collateral notes, to use the utmost good faith.

In *Dana v. Buckeye etc. Co.*, 38 Ill. App. 371, in discussing the power of sale contained in a collateral note similar to those here under consideration, the court said: "It is an authority to sell at public or private sale, but creditors, in whom such authority is vested, cannot exercise it otherwise than under a trust for other creditors' benefit as well as their own. . . . That a person holding property or securities in pledge occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would do with his own." Colebrooke, in the second edition of his most excellent work on Collateral Securities, section 118, thus states the rule: "Such a power given by contract, however, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as other contracts affecting equities of redemption, be construed favorably for the interests of the pledgor, so far as is consistent with the rights of the pledgee, . . . and a sale must not be forced for barely enough money to secure the payment of the debt." In 2 *Perry on Trusts*, fourth edition, section 602o, it is said: "Trustees and mortgagees, in the execution of their powers, must use the utmost good faith toward all parties in interest. This proposition cannot be too strongly stated and enforced. They must act impartially for every person who has any rights in the estate. . . . They ²⁸⁰ must use every effort to sell the estate under every possible advantage of time, place and publicity. They must exercise every discretion, so far as they have any, in an intelligent and reasonable manner." It devolves

upon the pledgee in the exercise of the powers given under the pledge to so conduct the sale as not to sacrifice the securities held by him, and in event the pledgee unfairly or unnecessarily prejudices the rights of the pledgor the sale will be set aside. Again, at section 602x, in speaking of the exercise of powers by trustees, the same author says: "They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity. . . . If proper notices of the sale are not given, or if the proceedings are in any way contrary to justice and equity, the sale will not be allowed to stand." Nor will the trustee be allowed to delegate his power or duty in the premises. And where, as in this case, the power of sale is general and no particular form is prescribed or pointed out in the collateral notes of executing the power, it became and was the duty of the bank to give such notice in a reasonable and proper manner, and if it failed to do so the sale for that reason might properly have been invalidated. In such case the notice must be certain both as to time, place, and the terms of sale, and the securities sold must be described with sufficient particularity to identify the property to be sold and so as to invite competition: Perry on Trusts, 4th ed., secs. 602q, 602r. The purpose of the notice is to advise the public of property to be sold, the time when, the place where, and the terms upon which it will be sold. In the circumstances of this case, we are of opinion that it devolved upon the pledgee in its notice of sale to refer to or state the power and authority under which the sale was to be made; but it is contended by counsel for appellant that inasmuch as no notice was provided for by the collateral notes the bank was at liberty to act as it saw fit in this regard, provided some notice was given to the public of ²⁸¹ the sale. This, as already seen, is not the law. The clause authorizing the sale of the securities in question without notice must we think be held to refer to a waiver of notice only so far as the pledgor was concerned, and has nothing whatever to do with a public sale. The latter, as we have seen, could not be made without some due notice to the public. Otherwise, what could reasonably be anticipated but a sacrifice of the security for want of bidders duly informed upon the subject?

The power of sale contained in the Simpson notes expressly authorizes the bank or its officers to sell in case of default. There is no question in our mind that in making such sale the bank had the right to act either through its officers or any agent

it might designate. A corporation, as is well known, from its very nature is incapable of acting only through the instrumentality of its agents: *Waterman on Corporations*, sec. 101; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30. Having decided to sell these securities at public sale, it was incumbent on the bank in the printed advertisement to show by virtue of what authority the sale was to be made.

Here was one of the strongest financial institutions in the state seeking to realize on sundry notes and deeds of trust having an aggregate face value of over forty thousand dollars. Can it be said that as trustee the power of sale contained in the collateral notes was properly exercised without giving the weight of its name to the transaction, and in making the sale in its own name? In other words, can the sale be said to have been made on behalf or in the name of the bank? The record shows that Mr. Mott advertised and made the sale in his own name, and neither in the notice nor in conducting the sale was his principal disclosed. The printed notice under which the sale was made was in his own name, signed "F. W. Mott, agent," and says: "Notice is hereby given that the undersigned will, at the east front door of the courthouse ²⁸² in the city of St. Louis, Missouri, on Monday, February 19, 1894, at 11 o'clock, sell for the benefit of whom it may concern the following described promissory notes." It does not appear from the notice that the bank was making or in anywise connected with the sale of these securities, or that the sale was being made in behalf of the bank, nor is any reference made to the ownership of the securities sold, or pledged, or by whom pledged. These are matters in respect to which the public should have been advised by the printed notice of sale. It is true the bank itself served a written notice on respondent similar to the notice printed in the "Post-Dispatch." This notice, however, was neither read at the sale, nor acted upon in making the sale. Although the president of the bank was present at the sale his purpose in attending the sale was to bid the property in for the bank, which he did accordingly. Notwithstanding the presence of the president of the bank, the sale seems to have been conducted throughout by Mott in his own name, without at any time disclosing his principal. If the advertisement had been in the name of the bank or so framed as to state upon what authority or by virtue of what power the sale was to be made, the public would thereby have been apprised that the bank was seeking to sell certain securities upon which it had

loaned money and its known financial standing in the community would doubtless have called more bidders together, and resulted in a more advantageous sale. But the notice as published did not refer to the authority under which the sale was being made, nor point out the owner of the collaterals. Moreover, the bank, in our opinion, did not exercise a proper discretion in attempting to make a sale of this class of securities without first giving the terms upon which the sale was to be made, and describing the securities and deeds of trust to be sold with sufficient particularity and certainty to inform the public of what property was to be sold, so that ²⁸³ prospective purchasers could examine the securities offered. The notice did not state whether the sale would be made for cash, or partly on credit, nor undertake to give the terms upon which it was proposed to make the same, nor was it even stated that the sale would be made at public vendue to the highest bidder. The notice should have given such a description of the securities and real estate covered by the deeds of trust as that they could be identified and examined, the mortgaged premises and their value ascertained. Besides, the prospective bidders were entitled to know whether they would be required to pay cash or part cash and a part on time. In a transaction of this magnitude, involving the sale of forty thousand dollars' worth of securities, the prospective purchasers should have been advised as to the terms upon which such securities could have been bought. It is not reasonable to suppose that the public would attend a sale of that magnitude without knowing the precise terms upon which it would be made; otherwise it might result in a sacrifice of the securities. It was the plain duty of the bank in a sale of this character, in the exercise of a sound discretion, to inform the public in reference to these matters, and having failed so to do, in the circumstances of this case, the sale was of doubtful fairness to the pledgor estate. Neither did the bank exercise a sound discretion in selling these securities when only three or four bidders were present and the weather so inclement that the parties in attendance were compelled to retire within the glazed storm doors of the courthouse, and there, out of the public view, sell notes and mortgages having a face value of forty thousand dollars and upward, to itself, for about one-fifth of the actual value of such securities—a sum so grossly inadequate that the mere statement of it shows there must have been some mismanagement on the part of the pledgee. While it is true, as a general rule, that such sales will not be set aside for mere

inadequacy of price, providing proper diligence was used by the trustee in selling, but where, as in this ²⁸⁴ case, the weather was so inclement that those present were compelled to withdraw inside of the storm doors of the courthouse, the bidders so few and the sum offered so low, the bank, in the exercise of a sound discretion, should have adjourned the sale until such time as the same could have been made under more favorable circumstances. Having failed to do so, the sale might for that reason have been set aside.

In discussing the duty of the trustee to adjourn the sale where there were only a few bidders and the sum offered inadequate to the value of the property, Perry on Trusts, fourth edition, section 602u, says: "If an adjournment of the sale is not prohibited by the power, the donee of the power may adjourn the sale to another time and to another place. Such power is implied. Of course, it is a discretionary power, and must be exercised in good faith; it may be the clear duty of the trustee to adjourn the sale, and an evidence of bad faith not to adjourn; as, if there are few or no purchasers present, and the bids are very low and inadequate to the value of the property." Having power, under the exercise of a sound discretion, it was the clear duty of the bank to adjourn the sale in order to prevent a sacrifice of the securities and obtain a fair price therefor: 2 Jones on Mortgages, 5th ed., sec. 1873. The trust relation occupied by the bank toward the pledgor made it incumbent upon the former to obtain the best possible price and to use every reasonable means to obtain the full value of the pledged property. The condition of the weather and the absence of any considerable number of bidders rendered an adjournment necessary in order to prevent a sacrifice of the securities.

In view of the character of the securities sold, consisting of numerous notes secured by sundry deeds of trust on different lots of land, we do not think the bank exercised a proper discretion in selling on four days' notice. The notice given was wholly inadequate to enable prospective purchasers to investigate into the value of the securities offered. ²⁸⁵ In the sale of the collaterals in question the amount to be realized therefrom is governed to a great extent at least by the value of the property embraced in the deeds of trust securing the same; consequently, time and opportunity should have been given for an examination of the notes and property covered by deeds of trust securing the same. It was expecting too much, within the four

days given, to examine all these matters, and it certainly cannot be claimed any prudent person would have sold similar securities on such short notice, owned absolutely by himself.

Counsel for appellant argues that respondent, by his attorney, was present at the sale and made no objection thereto, and consequently cannot be heard to complain. This point was not made in the court below but is raised for the first time here. The practice in this state has long been settled that a point not presented and passed upon by the trial court will not be considered by the appellate court. If, however, this question was properly before the court for adjudication the point would have to be ruled against the appellant, as the testimony shows that counsel for respondent in the presence of those in attendance at the sale openly protested against the sale being made, by announcing that he would present his objection thereafter to the court, thereby distinctly negating any acquiescence in the sale then about to take place, and it must have been distinctly understood by the officers of the bank that the respondent, as he had a right to do, questioned appellant's right to make the sale under the circumstances. Having indicated to those concerned his opposition to the sale, he cannot be said to have acquiesced in the subsequent proceedings, nor was he required to state his specific objections thereto, especially where he was not asked so to do. Moreover, it is not claimed that the bank was misled by any acts or conduct of the respondent or his attorney.

For the reason indicated the judgment of the circuit court will be affirmed.

All concur.

IN THE SUBSEQUENT CASE of *Axman v. Smith*, 156 Mo. 286, 57 S. W. 105, which was a suit in equity to set aside a trustee's sale on the ground that it was conducted unfairly and with partiality by him, and resulted in a sacrifice of the property, the court said: "The only question presented by the record is, Were the defendants entitled to a judgment on the facts stated in the petition? For the purposes of this question the defendants must be considered as confessing the truth of the statements of the petition. That is, they confess that the trustee for the purpose of enabling his client, the holder of the note secured by the deed of trust, to buy the land as cheaply as possible, so divided it and offered it for sale as to present it in its most unsalable form, and by that means did sell it in the whole to his client for less than half its value and half what it would have brought if he had acted fairly and in a faithful discharge of his duty as trustee. If the trustee acted in that manner, he certainly behaved in flagrant violation of his duty and his act should not be suffered to stand. A trustee is not the mere agent or attorney for the holder of the note, but he is the trusted agent of

both debtor and creditor: Jones on Mortgages, 5th ed., sec. 1771. In the sale of property under a deed like the one in question, he should use all reasonable effort and methods to make it bring as much as possible, and he should be fair and impartial as between debtor and creditor: Chesley v. Chesley, 49 Mo. 540; Tatum v. Holliday, 59 Mo. 422; Dunn v. McCoy, 150 Mo. 548, 567, 52 S. W. 21; Jones on Mortgages, 5th ed., sec. 1859."

TRUSTEE'S SALE—NOTICE.—If the discretion of a trustee is not limited by the instrument creating the trust he is not bound to give any notice of his intention to sell the property: See the monographic note to Tyler v. Herring, 19 Am. St. Rep. 286. For the essentials of a notice of a trustee's sale, see Yellowly v. Beardsley, 76 Miss. 613, 71 Am. St. Rep. 536, 24 South. 973; note to Tyler v. Herring, 19 Am. St. Rep. 286-288.

TRUSTEE'S SALE—ADJOURNMENT.—It is the duty of a trustee to adjourn a sale whenever, from the small attendance or from other circumstances, it seems apparent that a sale of the property is likely to result in realizing a much less sum than if the sale were adjourned to another time or place: See the monographic note to Tyler v. Herring, 19 Am. St. Rep. 291.

STATE v. BRANDHORST.

[156 Mo. 457, 56 S. W. 1094.]

JUDGMENTS — NATURALIZATION OF MINORS — COLLATERAL ATTACK.—A judgment of a court of competent jurisdiction naturalizing a minor, though erroneous, is not void, and cannot be collaterally attacked, but can be annulled or set aside only by appeal or writ of error.

E. C. Crow, attorney general, and R. Walker, for the appellant.

J. C. Kiskaddon, for the respondent.

460 SHERWOOD, J. On the trial of the issue joined in this quo warranto proceeding against Brandhorst, as collector of Gasconade county, the trial court upon what it considered sufficient evidence, found the issue in favor of Brandhorst, and denied the writ of ouster. Henry Brandhorst was born in Prussia in 1846. His father of the same name removed to this country in 1856, bringing his son with him. In 1857, the father, as found by the lower court, took out his first naturalization papers, when his son was eleven years of age. The father died in 1864, without having taken out his final papers. In 1865, the son himself took out citizen papers when he was nineteen years of age, as recited by the record.

The only question arising on these facts is whether they confer citizenship in respondent. This case is governed by the provisions of an act of Congress, "To establish a uniform rule of naturalization," approved April 14, 1802: 2 U. S. Stats. at Large, 153. Henry Brandhorst, Sr., had made the preparatory declaration required by section 1 of that act.

Section 2 of the act, approved March 26, 1804, provided: "That when any alien who shall have complied with the first condition specified in the first section of the original act, and who shall have pursued the directions prescribed in the second section of the said act, may die, before he is actually naturalized, ⁴⁶¹ the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law": 2 U. S. Stats. at Large, 293.

But the second section of the act of March 26, 1804, just quoted, was repealed by that of May 24, 1828: 4 U. S. Stats. at Large, 310. This fact is confessed and pointed out by Mr. Kiskaddon with a candor more charming than common. The lower court evidently was of the opinion, as appears from quotations, that sections 2165 and 2168 of the act of Congress of 1883 were the governing sections in this case; their provisions are in substance similar to those sections of the act of 1802 and 1804 already quoted. But inasmuch as the second section of the act of 1804 was repealed prior to the occurrences already related, there was no law in force in 1865 of the kind provided in section 2168.

But notwithstanding the absence of such a law, admitting a minor to be naturalized, yet respondent has been admitted for that purpose by the judgment of a court of competent jurisdiction. This judgment, even if it be erroneous, is not void; it cannot be collaterally attacked, and can only be annulled or set aside by appeal or writ of error, taken for that very purpose. That judgment has become competent and complete evidence of its own validity: *Spratt v. Spratt*, 4 Pet. 393.

Such naturalization judgments can, it seems, be impeached for fraud by a proceeding in a United States court for that purpose; but cannot be reached in such court for mere error or irregularity: *United States v. Norsch*, 42 Fed. 417.

The worst that can be said of the judgment that naturalized respondent is that the court giving that decision gave the wrong decision, when it had the power to give the right one. But this did not at all affect its jurisdiction to render the wrong judg-

ment. Courts of all grades in this state have the inestimable privilege of rendering wrong decisions, and these ⁴⁶² decisions, so far as concerns courts of *nisi prius*, pass muster and pass current until (possibly and perhaps) reversed on error brought or appeal taken. But errors in the judgment of courts of last resort are remediless except in the few instances where constitutional provisions admit of taking the cause one step higher.

In reference to the rule that judgments irregular or erroneous, but not void, cannot be overthrown by means of a collateral attack, see *State v. Wear*, 145 Mo. 162, 46 S. W. 1099, where the subject is elaborately discussed. That case was approvingly cited and followed in *State v. McKee*, 150 Mo. 233, 51 S. W. 421.

For these reasons we affirm the judgment.

All concur.

ON THE CITIZENSHIP OF CHILDREN, see *Dorsey v. Brigham*, 177 Ill. 250, 69 Am. St. Rep. 228, 52 N. E. 303; note to *Ludlam v. Ludlam*, 84 Am. Dec. 210-213.

COLLATERAL ATTACK.—A JUDGMENT merely voidable or erroneous cannot be attacked collaterally: *Edmunson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224, 67 N. W. 671. See, on collateral attack, the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119.

BABER v. HENDERSON.

[156 Mo. 566, 57 S. W. 719.]

EJECTMENT—COTENANCY.—A cotenant is not entitled to recover the whole of the premises in an action of ejectment against a stranger.

EJECTMENT BY COTENANT.—Each cotenant ousted of possession by a stranger must sue for and recover his aliquot share of the estate which he then holds in common with his disseisor, until the remaining cotenants institute proceedings and oust the stranger from the possession of his or their undivided interest in the premises.

EJECTMENT BY COTENANT—INTEREST ACQUIRED AFTER SUIT BROUGHT.—A cotenant by action in ejectment against a stranger can recover for only such undivided interest in the premises as he owned at the time of ouster laid. He cannot recover for an interest acquired therein after suit is commenced and before trial, although such stranger has no interest of any nature in the premises.

ADVERSE POSSESSION—NAKED POSSESSION.—Possession, no matter how long continued, is no bar to recovery by the

true owner, if the party in possession entered upon the land without any claim of title, did not acquire nor assert title to the land at any time, nor claim to hold it adversely to the true owner.

ADVERSE POSSESSION.—MERE NAKED POSSESSION, no matter how long asserted, without claim of right, never ripens into a perfect title by limitation, and to be effective, adverse possession must be hostile to the title of the true owner and under a claim of right.

R. H. Stevens, for the appellant.

F. A. Heidorn and J. R. Warfield, for the respondent.

⁵⁶⁸ **ROBINSON, J.** This is a suit by ejectment for two irregular parcels of land adjoining the town of Bridgeton, in St. Louis county, spoken of and designated throughout the trial as lots "D," "E," and "F." Defendant's answer was a general denial, after admitting that plaintiff was entitled to a three twenty-eighths interest in that part of the land designated as lot "D." At the trial defendant's claim was title by adverse possession of the property for the statutory period of limitation. The court found the issue in favor of defendant as to lot "E," but found that plaintiff was entitled to fifty-eight three hundred and fifteenths interest in lots "D" and "F," and rendered judgment for plaintiff for that interest accordingly. From that judgment defendant, after the usual preliminaries for an ⁵⁶⁹ appeal, has brought the case here for review, assigning as error the action of the trial court in permitting plaintiff to read in evidence a deed conveying to himself an undivided interest to part of the property in controversy made after the plaintiff had instituted his suit herein, and for the action of the court in rendering its judgment based thereon declaring plaintiff's interest in the property augmented to the extent of the interest conveyed by said deed; and further because the court erred in finding from the evidence that defendant and those under whom he claimed had not shown a title by limitation to that part of the property known as lot "D," except as to the three twenty-eighths interest owned by plaintiff.

The plaintiff now contends, however, that as he established his right to recover a three twenty-eighths interest in lots "D" and "F" by what is known as the James deed, it is immaterial to consider the objection of appellant to the introduction of the deeds of James W. Robertson et al. to the plaintiff, made after the institution of this suit; that as the James deed established plaintiff's title to the property, the after-acquired deed of

Robertson et al. only went to the extent of enlarging the quantum of that interest, which can in nowise prejudice the defendant, he having shown no title to the property in himself.

Plaintiff's contention would be true if under our practice one tenant in common, though entitled under his deed to only a part interest in the premises, yet would be entitled to recover the whole thereof in a suit against a stranger, and when put into possession under his judgment, to hold for the other cotenants as well as himself. In many jurisdictions this rule prevails, but such is not the case in this state. It is undoubtedly true that no harm was occasioned to defendant by the action of the plaintiff reading in evidence the deeds acquired after the institution of this suit, or in the action of the court in adjudging upon the interest ⁵⁷⁰ therein conveyed if the rule of practice in this state was as plaintiff contends. If plaintiff, with an unquestioned fractional interest, was entitled to recover the entire property, then of course the matter of determining that particular interest greater or less could not concern the defendant, who is to be ousted from the whole, and errors by the court upon that point would not be hurtful to him. As said above, such is not the rule of practice in this state, however general it may be throughout the different states of the Union. Hence each tenant in common in this state who is ousted of possession by a stranger must sue for and recover his aliquot part or share of the estate, which part or moiety so recovered he holds in common with his disseisor, until his remaining cotenants institute like proceedings as himself to oust the stranger from the possession of his or their undivided interest in the premises: *Gray v. Givens*, 26 Mo. 291; *Biddle v. Mellon*, 13 Mo. 335.

This being true, and plaintiff being at the institution of this suit only entitled to the aliquot part or share of the entire estate represented by the James deed, it was error in the court permitting the deed of James W. Robertson et al., made to plaintiff after the institution of his suit herein, to be read in evidence, and when read, to have rendered its judgment declaring plaintiff's interest in the property increased to the extent of the after-acquired interest evidenced by said deed. The plaintiff was entitled to recover an undivided interest equal only to that represented by the James deed, or such other deeds as he had or held before the institution of his suit herein. In ejectment, whether the claim is for an undivided or the whole interest in the premises, the plaintiff must always show title in himself before the ouster laid in his declaration. For disre-

garding the provisions of this rule, the judgment of the trial court in favor of plaintiff will be reversed and the cause remanded for a new trial.

⁵⁷¹ Appellant's second assignment, that the trial court committed error in rejecting his claim of title by limitation to that part of the property in controversy known as lot "D," is wholly without merit. The court might properly have found, and in all probability did find, from the evidence that the defendant and his grantor Yates had not in fact been in the actual possession of said lot for ten years next before the institution of this suit. The proof upon that issue was not at all satisfactory, or as convincing as it should be, where the record paper title to property is sought to be set aside by this artificial substitute. But had the trial court found otherwise, and believed that defendant and his grantor together had been in the actual occupancy of the lot for more than ten years, still under the manner of their holding no length of time would have ripened their possession into a title by limitation.

Thomas B. Yates, under whom defendant now claims the property (and to whose possession defendant's must be linked to make out his claim of title by limitation), testified that he first took possession of lot "D" some time during the month of April, 1886, at the suggestion of the defendant herein, and that he held and cultivated it as a garden from that time until some time during the year 1891, when he left the town of Bridgeton and made a deed to the defendant. The following excerpt from his testimony, under an examination by the defendant in person, will show the why and the manner of his entry and possession of the premises better than it can otherwise be told:

"Q. How did you come to plow that up? Did you have any conversation with me about that? A. I did. I commenced my lot, the lot that Dr. Heidorn now owns, and I worked my way. You asked me why I did not plow that piece of ground [referring to lot "D"], and I told you that I did not want to get in trouble, ⁵⁷² and you told me to go and plow it up. You would stand good for damages.

"Q. And you took possession on my guaranteeing you against trouble? A. Yes, sir.

"Q. Then did you have any further talk about it? A. Yes, sir. You told me that if I held the ground for ten years it would be mine.

"Q. And if you did not hold it ten years to let me have it? A. Yes, sir.

"Q. You held it, then you gave me a deed for it? A. I gave you my right to it.

"Q. You had that in possession under my consent all the time? A. Yes, sir."

The witness afterward, in testifying, used this language: "Judge Henderson told me to plow that piece of ground and afterward told me if you hold that piece of property ten years you can hold it. Then he asked me if I did not hold it would I turn it over to him, and I told him I would."

On examination by plaintiff's counsel the witness testified as follows:

"Q. Did you claim it [the lot] as your own? A. I worked it for four years.

"Q. Did you claim it as your property? A. I took it up and when I left there I told defendant I would give him my right to it.

"Q. You did not claim it as your own? A. No, sir.

"Q. Never intended to? A. If I lived there long enough I might.

"Q. For two or three years after you cultivated it you had no intention of claiming it as your own. You farmed it as a piece of idle property? A. Yes, sir."

The defendant then testified that he went into possession of the lot under his deed from the witness Yates in ⁵⁷³ 1891, claiming it as his own, and that he had held the continuous possession of it up to 1894, when this suit was instituted. No suggestion is made in defendant's testimony (as in his answer filed) of plaintiff's right to a three twenty-eighths interest in the lot. Ignoring that matter, however, defendant has shown himself totally wanting in a title by limitation to lot "D" or any part thereof.

When Yates went into possession of the lot in 1886, and began to cultivate it as a garden, he had no claim of title to the lot, nor did he claim it adversely to the true owner, whoever he should be. Not only did he not have or assert a claim of title to the lot during the time he had it in possession, but he expressly declared that he did not claim to own it, and that he only entered upon the lot to cultivate it, under the assurance that defendant (another stranger, as himself) would guarantee him against trouble. No length of time under such circumstances would have ripened Yates' first possession into a title by limitation. As he claims under no title, time had nothing upon which to act, that it might develop the imperfect beginning into

a perfect and completed title at the termination of the statutory period of limitation.

Mere naked possession, no matter how long asserted without a claim of right, never ripens into a perfect title, or rather a title by limitation. To be effective, adverse possession must be hostile to the title of the true owner, and under a claim of right. Measured by this standard defendant's possession of lot "D" under his deed from the witness Yates falls far short of establishing in himself a title by limitation. The trial court upon that issue decided correctly in denying defendant's claim. For reasons above indicated, however, the judgment of the trial court is reversed and the cause remanded for a new trial.

All concur.

A COTENANT MAY RECOVER, IN EJECTMENT, the whole of the property of the cotenancy as against one in possession thereof without title: *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771, 66 N. W. 1083; monographic note to *Marshall v. Palmer*, 50 Am. St. Rep. 842. Compare *Marshall v. Palmer*, 91 Va. 344, 50 Am. St. Rep. 838, 21 S. E. 672; *Johnson v. Hardy*, 43 Neb. 368, 47 Am. St. Rep. 765, 61 N. W. 624.

POSSESSION, TO BE ADVERSE, must be under a claim of right: *Hess v. Rudder*, 117 Ala. 525, 67 Am. St. Rep. 182, 23 South. 136. One in possession of land, who did not enter under any claim or color of right, nor in the belief that he had any right, does not hold by adverse possession: *Smeberg v. Cunningham*, 93 Mich. 378, 35 Am. St. Rep. 613, 56 N. W. 73. See, further, the monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162.

GEIST v. ST. LOUIS.

[156 Mo. 643, 57 S. W. 766.]

MUNICIPAL CORPORATIONS ARE NOT SUBJECT TO PROCESS OF GARNISHMENT, nor to suit by creditors' bill.

MUNICIPAL CORPORATIONS—GARNISHMENT.—If judgment has been rendered against a municipal officer upon which execution has been issued and returned nulla bona, the municipality cannot be compelled to pay the salary due such officer to his judgment creditor, either by process of garnishment, or by suit against such officer and the municipality.

B. Schnurmacher and C. C. Allen, for the appellant.

Kinealy & Kinealy, for the respondent.

645 BRACE, P. J. At the December term, 1896, of the circuit court of the city of St. Louis the respondent recovered

judgment against D. P. O'Brien for the sum of one hundred and twenty-four dollars and ten cents, bearing eight per cent per annum interest, on which execution was issued returnable to the April term, 1897, of said court, which execution at said term was returned nulla bona and wholly unsatisfied.

Afterward on the 30th of June, 1897, the respondent instituted this suit against the said O'Brien and the city of St. Louis, reciting these facts, and charging in his petition for his cause of action that "defendant O'Brien is, and has been for a long time, in the employ of the defendant city of St. Louis, in the office of its recorder of deeds, at a monthly salary of one hundred and twenty-five dollars, that said O'Brien has now earned, by reason of said employment, and there is still due him and unpaid the ⁶⁴⁶ sum of one hundred and twenty-five dollars for services performed as an employé of said city during the month of June, 1897; that said O'Brien is wholly insolvent, and has no property other than the amount of money due him from the city of St. Louis, as aforesaid, and the money which he may hereafter earn as such employé of said city, out of which plaintiff may make his judgment aforesaid, or upon which he can cause any process or execution to be levied, and plaintiff knows of no other person who is indebted to defendant, or whom he can cause to be summoned as garnishee of defendant," and praying that the city be required to pay the amount so due to said O'Brien to be applied on said judgment.

O'Brien made default, and the city demurred to the petition on the following grounds: "1. The petition does not state facts sufficient to constitute a cause of action against this defendant; 2. There is no equity in the petition; 3. Public policy prohibits equitable garnishments against a municipal corporation, because the public interests would suffer by abstracting from their corporate duties the time and attention of the officers and occupying them in contests about which the corporation has no interest, and thereby there would be an interference with the city in the administration of its public governmental functions."

The demurrer was overruled, and the city standing on its demurrer, judgment was rendered against it for the said sum of one hundred and twenty-five dollars, and the city appealed.

1. "In nearly all of the United States, statutes have been enacted, the usual purport of which is, that when an execution has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor and any other person to compel the discovery of anything in ac-

tion, or other property belonging to the judgment debtor, and of any money, thing in action, or ⁶⁴⁷ other property due to him, or held in trust for him, and to procure satisfaction of the judgment out of such property": 5 Ency. of Pl. & Pr. 415. The proceeding under these statutes may be called equitable garnishment, for the sake of brevity, and in order to distinguish it from ordinary garnishment, or trustee process. In Missouri we have not, and never have had, a statute of similar purport, our kindred statute being simply a bill of discovery against the debtor himself (Rev. Stats. 1889, sec. 4971 et seq.), leaving the judgment creditor to pursue his legal remedy against the property or thing in action disclosed. The legal remedy for such creditor, when the property is a debt due from a third person to his debtor, is the statutory process of garnishment; from that process "municipal corporations" are by statute expressly exempted: Rev. Stats. 1889, sec. 5220.

This exemption was first incorporated in the statute in 1855: Rev. Stats. 1855, sec. 27, p. 246. Prior to that time, however, in *Hawthorn v. St. Louis*, 11 Mo. 59, 47 Am. Dec. 141, decided in 1847, in which it was sought by an execution creditor to reach the salary of the recorder of the city by garnishment, it was held that although private corporations may be proceeded against by garnishment, yet "the city of St. Louis is a public municipal corporation, created for the public benefit, and not subject to the same rules governing private corporations, such as banks, insurance companies, and other similar corporations. It should not, therefore, be compelled to stand at the bar of all the courts in the state and participate in the judicial controversies carried on between debtors and creditors. While these contests would be going on, the public interests would suffer, by abstracting from their corporate duties the time and attention of the officers, and occupying them in contests about which the corporation had no interest. And however desirable it may be to creditors to enforce against the officers of the corporation their just demands, ⁶⁸⁴ by the means resorted to in this case, yet we think that public policy forbids the imposition of such a liability upon the corporation."

In *Fortune v. St. Louis*, 23 Mo. 239, decided in 1856, the principle laid down in the *Hawthorn* case was adhered to, and it was again ruled that the city was not subject to garnishment. Apart from express legislative declaration to that effect, the doctrine that municipal corporations, on ground of public policy—more fully set out in the cases cited in the brief of counsel

for the appellant than in the Hawthorn case—are not subject to statutory garnishment, though sometimes denied, had then and has now the support of the great weight of authority.

After the policy of this state on the subject had been thus announced by this court in these two cases, and expressly declared by the legislature in the Revision of 1855, in *Pendleton v. Perkins*, 49 Mo. 565, decided in 1872, in an able and learned opinion written by Bliss, J., it was held, in the language of the syllabus, that: "Where a debtor has absconded so that judgment cannot be obtained against him, and has no property in the state subject to attachment, but has money in the city treasury belonging to him, it may be reached by bill in equity, in the first instance, without a previous judgment at law, and without showing fraud or any other recognized ground of equitable jurisdiction; and the fact that cities are not liable under the statutory garnishment will not protect them from such proceeding in equity." And it is upon this decision that counsel for respondent rely in support of the judgment of the circuit court.

The conclusion thus broadly stated was reached by three questions, all of which were answered in the affirmative. They are as follows: "1. Will a creditor's bill lie to subject a fund or chose in action of the debtor, without showing fraud or some other recognized ground of equitable ⁶⁴⁹ jurisdiction? 2. Will it lie in favor of the plaintiff in this case without having first obtained judgment and issued execution? 3. Will it lie against the city?"

Answering the first, after a review of the authorities, it was said: "The affirmation of the proposition that a judgment creditor, who has exhausted every ordinary means to satisfy his judgment, should have the aid of the court, in analogy to its ancient chancery jurisdiction, to reach his debtor's funds, whether fraudulently withdrawn or concealed or not, seems to be necessarily inferred from the main object of chancery jurisdiction—to furnish a remedy when the strict rules of legal practice fail." The proposition announced in this answer has been recognized and approved by the courts and the profession in this state as sound law for more than a quarter of a century, and thus by judicial construction we have in this state a remedy that may well be denominated equitable garnishment, as comprehensive in scope and purpose as the remedy provided by the statutory enactments in other states to which we have alluded. The soundness of the doctrine upon which it rests is not questioned, and need not be inquired into in this case; and in this connec-

tion it is only necessary to say that this equitable remedy, as is obvious from the principle upon which it rests, exists for the purpose of furnishing relief only in cases where the relief provided by common or positive law fails or is inadequate, but cannot be used for the purpose of giving relief forbidden by positive law: *Hadden v. Spader*, 20 Johns. 553; *Bigelow v. Congregational Soc.*, 11 Vt. 283; *Venable v. Rickenberg*, 152 Mass. 64, 24 N. E. 1038; *Addyston Pipe Co. v. Chicago*, 170 Ill. 580, 48 N. E. 967; *Ager v. Murray*, 105 U. S. 126.

As was said by Mr. Justice Gray in *Ager v. Murray*, 105 U. S. 129: "It is within the general jurisdiction of a court of chancery to assist a judgment creditor to ⁶⁵⁰ reach and apply to the payment of his debt any property of the judgment debtor, which, by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law."

By Field, J., in *Venable v. Rickenberg*, 152 Mass. 66, 67, 24 N. E. 1084: "Legal causes of action which cannot be prosecuted by trustee process cannot be prosecuted in equity to reach property in its nature attachable by trustee process, because trustee process will not lie. To hold otherwise would be to contravene the will of the legislature. For the same reason, if it be true that the Public Statutes, chapter 157, section 83, do not leave plaintiffs in this case any adequate remedy at law, equity cannot supply the deficiency: *Schlesinger v. Sherman*, 127 Mass. 206; *Emery v. Bidwell*, 140 Mass. 271, 3 N. E. 24; *Wilson v. Martin Wilson Automatic Fire Alarm Co.*, 149 Mass. 24, 20 N. E. 318."

By Craig, J., in *Addyston Pipe Co. v. Chicago*, 170 Ill. 584, 48 N. E. 968: "If, as we have held, a municipal corporation is not liable to the process of garnishment, upon what ground can a creditor's bill be maintained against a municipal corporation? If it is contrary to public policy to permit the one, upon the same ground and for like reasons must not the other be denied? The process of garnishment and a creditor's bill are, in effect, instituted for the same purpose. They are, as a general rule, instituted to reach money in the hands of a third party due and owing from a judgment debtor to a judgment creditor. A reference to the statute under which the two proceedings are instituted will show their similarity." The necessity of this limitation was recognized in *Pendleton v. Perkins*, 49 Mo. 565, as we shall see further on.

With the answer to the second question in that case we have nothing to do.

651 In answering the third the learned judge said: "Our garnishment act (section 3) exempts municipal corporations from its operation, and it is claimed that, upon the principle that equity follows the law, they should also be exempt from creditor's bills or garnishments in equity. Municipal corporations, in this regard, are classed with sheriffs, tax collectors, administrators, etc., who hold as trustees, and would be exempt without the statute. So it had been held, before this enactment, that towns and cities would not be garnished for a sum due an officer as part of his salary: *Fortune v. St. Louis*, 23 Mo. 239; *Hawthorn v. St. Louis*, 11 Mo. 59, 47 Am. Dec. 141. Public policy forbids creditors from thus stepping in between the city and its public servants; and the statute, in seeking to prevent any future attempt in that direction, went much further, and included all kinds of liabilities, so that a debtor's funds, if in the hands of a municipal corporation, are placed beyond the reach of his creditors by statutory garnishment. There is no reason why a city, for an ordinary liability unconnected with its present public service, or the prosecution of its public works, should not, like private corporations, be held to answer a garnishment process. But the prohibition is general, and creditors like the present plaintiff are deprived of the usual remedy against their absconding debtors, if the latter have been sharp enough to place their funds in the city treasury. Upon what principle should this fact also deprive them of the equitable remedy they would possess if the garnishment process were unknown to the law? So far from that, it is the foundation of their right to relief. The maxim that equity follows the law has no such application; otherwise, in most cases where legal remedies fail, equitable relief would be cut off. The court, in analogy to the former relief in chancery, would disregard the letter of the statute forbidding garnishment, but would conform to its spirit and refuse 652 to interfere when the reason for the prohibition existed. Perhaps the object of the prohibition was to leave the matter to another forum—to one whose remedies are more flexible than ordinary judgments—so that, whatever the relief, it may be consistent with public policy, and may be given in view of the debtor's relation to the city.

"To deny the relief sought would permit the debtor to withdraw property from the state which equitably belongs to his creditors. It is the policy of all states to protect home creditors, and in pursuance of this policy, and in absence of any other remedy, I think this proceeding should be sustained."

This is the whole of the dicta on that subject, from a careful reading of which but one conclusion can be drawn as to the holding of the court. Not that the principle of the statute did not apply to equitable garnishment, but that the case then in hand, although within the letter, was not within the spirit of the statute, and, such being the case, the former ought to give way to the latter. In other words, "the public policy which forbids creditors from thus stepping in between the city and its servants," which in the opinion is postulated as the reason of the statute, it was held, does not include the case of a judgment debtor who is not a servant of the city, but who has absconded and has in the city treasury a fund "unconnected with its present public service, or the prosecution of its public works," although such fund comes within the exemption of the letter of the statute. The ruling in that case on this branch of it, "hath this extent; no more." It does not extend to the case now in hand, in which the fund sought to be reached is the salary of a servant of the city, who has not absconded, but who is in its "present public service" with which that salary is connected. Hence the contention of respondent's counsel is not supported by that case. Nor does it receive any support ⁶⁵³ from the rulings in the subsequent cases cited in their brief, from the appellate courts of this state, in which *Pendleton v. Perkins*, 49 Mo. 565, is cited with approval; for in none of these cases was the question now in hand either raised or passed upon; as is well shown in the brief of the counsel for appellant, who further strenuously contends that the ruling in that case on this branch of it, even to the extent that it goes, ought to be no longer maintained. But as anything that might be said on this contention might be regarded as obiter, from which we are already so much afflicted, we refrain from entering upon that contention. That stream will be crossed when we come to it. The judgment of the circuit court is reversed, and the cause remanded with directions to that court to sustain the demurrer.

All concur, except Marshall, J., not sitting.

A MUNICIPAL CORPORATION CANNOT BE GARNISHED: *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 61 Am. St. Rep. 395, 68 N. W. 606; *Porter etc. Co. v. Perdue*, 105 Ala. 293, 53 Am. St. Rep. 124, 16 South. 713. The salary of a public officer due him from a municipal corporation cannot be reached by garnishment; See the monographic note to *Leake v. Lacey*, 51 Am. St. Rep. 115-117.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

PEOPLE v. MOSHER.

[163 N. Y. 32, 57 N. E. 88.]

CONSTITUTIONAL LAW.—IN INTERPRETING A CONSTITUTION it is to be construed as a whole, complete in itself. Force is to be given to every provision contained in it, and each clause explained and qualified by every other. The words must be presumed to have been employed in their natural and ordinary meaning, and if different provisions seem to be in conflict, they must be harmonized if possible, and that construction adopted which will render every other provision operative, rather than one which will make some idle or nugatory.

CONSTITUTIONAL LAW—CIVIL SERVICE — MAKING AN APPOINTMENT DEPEND UPON AN EXAMINATION.—Where a state constitution provides that city officers shall be elected by the electors and appointed by such authorities as the legislature shall designate for that purpose, the power of the municipal authorities to make appointments cannot be changed by statute into a mere ministerial authority of appointing such persons as shall, as the result of a competitive examination, be reported to them as best qualified. This remains true though the same constitution declares that appointments and promotions in the civil service of the state, including cities and villages, shall be according to merit and fitness, to be ascertained, so far as practicable to do so, by examinations which, so far as practicable, shall be competitive.

Mandate to compel the defendant to appoint relator to the position of superintendent of streets and city property of the city of Binghamton. He relied upon section 13 of chapter 370 of the Statutes of 1891, which reads: "Appointments shall be made to or employment shall be given in all positions in the competitive class that are not filled by promotion, reinstatement, transfer, or reduction, under the provisions of this act and the rules in pursuance thereof, by appointment of those graded highest in open competitive examinations conducted by the state or municipal commission, except as herein otherwise provided."

The constitutionality of this statute was upheld by the special term, but upon appeal to the appellate division it was there held unconstitutional. Thence an appeal was taken to the court of appeals.

Samuel H. Ordway, for the appellant.

A. M. Sperry, for the respondents.

³⁵ MARTIN, J. The only controversy upon this appeal relates to the constitutionality of the civil service statute of 1899. The question involved is the power of the legislature to abrogate the right conferred by the state constitution upon the local authorities of a city to appoint such of its officers as are not directed by the constitution to be elected or otherwise appointed: Const., art. 10, sec. 2.

The office of superintendent of streets and city property of the city of Binghamton falls within that statute, and, if valid, it is controlling as to the appointment of an incumbent of that ³⁶ office. The provisions of the constitution, by which its validity is to be tested, are section 2 of article 10 and section 9 of article 5.

Section 2 provides: "All city officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose"; while section 9 declares: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made."

In interpreting the constitution, it is to be considered as a whole, complete in itself; force is to be given to every provision contained in it, and each clause explained and qualified by every other. The words used must be presumed to have been employed in their natural and ordinary meaning, and if different portions seem to be in conflict, they must be harmonized if possible, and that construction adopted which will render every

provision operative rather than one which will make some idle or nugatory: *Gilbert etc. Ry. Co. v. Anderson*, 3 Abb. N. C. 434; *People v. Angle*, 109 N. Y. 564, 575, 17 N. E. 413; *People v. Roberts*, 148 N. Y. 360, 367, 42 N. E. 1082; *People v. Rathbone*, 145 N. Y. 434, 440, 40 N. E. 395; *In re Smith v. Board of Supervisors*, 148 N. Y. 187, 189, 42 N. E. 592; *Cooley's Constitutional Limitations*, 58.

Therefore, these two provisions should be construed together, giving force to both, and to each should be accorded its appropriate place and proper effect, with some office to perform, and at the same time they should be so construed as ³⁷ to operate harmoniously. We find no repugnancy between these sections of the constitution. Section 2 has been a part of the organic law of the state for many years, and obviously it was not intended to be superseded or changed, as no language was employed in the constitution of 1894 to indicate any such purpose. Moreover, the proceedings of the constitutional convention show that it was intended to be continued in force in its existing form. Section 9 was an amendment adopted in 1894. Both being part of the present constitution, the most that can be claimed is that they should be read and construed together. Reading the amendment of 1894 into section 2, it in effect provides that all city officers whose election or appointment is not otherwise provided for by the constitution shall be appointed by such authorities thereof as the legislature shall designate for that purpose, which appointments shall be made according to merit and fitness, to be ascertained by competitive examinations so far as practicable. When thus read, it becomes manifest that under the constitution the power of appointment still remains in such local authorities as the legislature has designated for that purpose. No alteration in that respect has been made or attempted. The only change effected by the amendment of 1894 is the requirement that the local authorities in making such appointments shall make them "according to merit and fitness," to be ascertained by examinations, competitive or otherwise. The amendment relates only to the qualifications which appointees shall possess to justify their appointment under section 2, and the manner in which they shall be ascertained. Thus the power of appointment is still vested in the local authorities of the various municipalities of the state, and the amendment has wrought no change as to the officers or bodies who are to make such appointments. The result is the same whether these sections are read together or separately. Sec-

tion 2 in direct terms provides that such appointments shall be made by the local authorities. Section 9 plainly recognizes that method of appointment by providing for appointments in the civil service without any designation, express or ³⁸ implied, of any new or other authority by which they are to be made. All that is provided by that section is that appointments made by the proper appointing power are to be according to merit and fitness, but it in no way attempts to change or interfere with the authorities who are to make them. These provisions of the constitution show quite conclusively that the appointment of city officers, whose election or appointment is not otherwise provided for by the constitution, must still be made by such local authorities of the city as the legislature has designated for that purpose. While the legislature is authorized to designate the local authorities who are to appoint, yet, when they are thus designated, their actual power becomes constitutional and is controlled by that instrument. In this case the local authorities so designated to appoint a superintendent of streets and city property were the board of street commissioners of the city of Binghamton, and hence that board alone had power under the constitution to make an appointment to fill that office. Yet the special term, without permitting it to in any way exercise that power, held the statute of 1899 to be valid, and that under it the board had no right of selection or choice between the several candidates certified as eligible to the place or between the two veterans who were so certified, but that it was absolutely bound to appoint the one veteran graded highest by the civil service commission, and granted a peremptory mandamus commanding the board to appoint that person.

If the civil service commissioners have power to certify to the appointing officers only one applicant of several who are eligible, and whom they have, by their own methods, ascertained to be fitted for a particular position, and their decision is final, or if, where more are certified, the one graded highest must be appointed, then the civil service commission becomes and is the actual appointing power. To reach such a result, however, it must be held that the word "appointment" as used in the constitution is not to be given its usual and ordinary meaning, but may be so limited and restricted as to leave in the local authorities a mere ministerial duty, with no discretion, ³⁹ nor choice, nor responsibility in respect to the person to be appointed. Such a construction would completely nullify

the provision of the constitution which confers the power of appointing city officers upon the local authorities of the municipality. A fair reading of the constitution leads to no such result.

Early in the history of the civil service reform in this country, the signification of the word "appointed" was considered in connection with the United States civil service statute. The United States attorney general, in discussing that question, said: "If to appoint is merely to do a formal act, that is, merely to authenticate a selection not made by the appointing power, then there is no constitutional objection to the designation of officers by a competitive examination, or any other mode of selection which Congress may prescribe or authorize. But if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible. If the President, in appointing a marshal, if the senate in appointing its secretary, if a court or head of department in appointing a clerk, must take the individual whom a civil service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the President, of the senate, of the court, or of the head of department, but are the will and judgment of the civil service board, and that board is virtually the appointing power": *Opinions U. S. Atty. Gen.*, vol. 13, p. 516.

A subsequent report of the United States civil service commission contained the following statement upon this subject: "The appointing power, conferred by Congress upon the heads of departments, under the strict terms of the constitution, is a power of choice—a right of selection for appointment from among several. That opportunity of choice ⁴⁰ is inseparable from the power itself. . . . A choice between four seems to preserve the authority of the appointing power, and to allow a sufficient variety of capacity for answering the needs of the public business. For both these reasons, a requirement that the applicant graded highest be taken would be indefensible": *Report of 1884*.

When we examine the report of the civil service commission of this state we find that it is said: "It is a wise provision that the commission has no power to make appointments or removals, or even to recommend persons for appointment. Any

authority of that character would be fatal to its usefulness, and an unwarrantable interference with sound principles of administration. Its sole duty in its subordinate sphere is to ascertain the fitness or qualifications of applicants for the service. The appointing power of all public officers remains unimpaired, and should so remain. But the field of selection is limited to those who have been ascertained to be qualified": Report of 1885.

The decisions of this and other courts, state and federal, as to the meaning of the word "appointment," and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial: 19 Am. & Eng. Ency. of Law, 423; Johnston v. Wilson, 2 N. H. 202, 9 Am. Dec. 50; Hoke v. Field, 10 Bush, 144, 19 Am. Rep. 58; People v. Fitzsimmons, 68 N. Y. 514; Marbury v. Madison, 1 Cranch, 137; Craig v. Norfolk, 1 Mod. 122; People v. Murray, 70 N. Y. 521; Taylor v. Kercheval, 82 Fed. 497, 499; Menges v. Albany, 56 N. Y. 374; People v. Angle, 109 N. Y. 564, 573, 17 N. E. 413. Thus it is seen that the authorities upon the subject and the opinions of those who have been connected with the civil service reform from its inception all agree in the conclusion that the ⁴¹ power of selection for a public office is and should be vested alone in the officers or boards authorized to appoint, although it be limited to persons possessing the qualifications required by the civil service statutes and rules, and that at least some power of selection is necessary to constitute an appointment, which should be exercised by the local authorities, independently of the civil service commission.

In Rathbone v. Wirth, 150 N. Y. 459, 468, 45 N. E. 15, section 2 of article 10 was under consideration by this court, and its purpose and force were there discussed. In delivering an opinion in that case Judge Gray said: "The legislature is expressly authorized to designate the local authority, who shall appoint the local officers, and it is impliedly prohibited from doing more than that, or from placing limitations upon this power of appointment. . . . 'Every positive direction contains an implication against anything contrary to it; or which would frustrate, or disappoint, the purpose of that provision'": People v. Draper, 15 N. Y. 544. In further discussing that sec-

tion and its purpose, the case of *People v. McKinney*, 52 N. Y. 374, was cited, where Judge Andrews said: "The obvious purpose of the provision of the constitution which has been quoted (Const., art. 10, sec. 2), was to secure to the people of the cities, towns, or villages of the state the right to have their local offices administered by officers selected by themselves." He also quotes from the opinion of Judge Allen, in *People v. Albertson*, 55 N. Y. 50, the following language: "The theory of the constitution is, that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them and the electors and inhabitants disfranchised by any act of the legislature, or of any or all the departments of the state government combined."

Assuming, then, in the further discussion of this question, that the purpose of this provision of the constitution was to vest in the local authorities designated by the legislature the power of appointment and to secure to each municipality the ⁴² right of self-government, we are led to an examination of the statute of 1899 in the light of these constitutional provisions and the decisions under them. As we have already seen, the right of appointment, of necessity, involves the power of selection and the exercise of discretion and judgment. Without that power in no just sense can it be said that the right exists. If the act of 1899 is valid and bears the construction accorded to it by the special term, then the local authorities designated by the legislature to appoint a superintendent of streets and city property are absolutely deprived of any power of selection, but are required to name the person graded highest. In other words, the real power of appointment is transferred from the authorities in which it is vested by the constitution to the civil service commissioners.

Moreover, by section 10 of the act of 1899, if the mayor for any reason fails to appoint municipal civil service commissioners, the right to appoint them is conferred upon the state commission until the expiration of the term of the mayor then in office, and until their successors are appointed and qualify. The state commissioners are also authorized to remove any municipal civil service commissioner for cause. Therefore, there may be circumstances under which the selection of all the appointive officers of a city will be controlled by the state civil service commissioners, and thus the people and the local authorities of the municipality be deprived of any voice in

the selection of its officers. If it be said that no such condition has arisen in this case, the answer is that the validity of this statute must be determined by the nature, character, and scope of the powers attempted to be conferred, although they may not have been actually exercised: *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Goxe v. State*, 144 N. Y. 396, 139 N. E. 400; *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464, 28 N. E. 1040; *Colon v. Lisk*, 153 N. Y. 188, 194, 60 Am. St. Rep. 609, 47 N. E. 302.

I fancy it would be difficult to imagine a construction of the constitution which would more completely surprise the inhabitants of the various municipalities or political divisions of the state, or that would work greater injury to fair and proper civil service reform, than one which should hold that ⁴³ the principle of local self-government for the cities, villages, and other municipalities of the state has been so far abrogated by the amendment of 1894, that the power of appointment of their local officers may be transferred from the local authorities to a centralized commission of state appointees, and thus the principle of local self-government practically destroyed.

Although this court in effect held that the statute of 1883 and the rules adopted by the civil service commissioners under it, which required that officers to be appointed should be selected from the highest three on the eligible list, was valid (*People v. Roberts*, 148 N. Y. 360, 42 N. E. 1082; *Chittenden v. Wurster*, 152 N. Y. 345, 358, 46 N. E. 857), still, when the legislature has, by statute, undertaken to deprive the local authorities of all right of selection and appointment, it has exceeded its constitutional power, and the act is clearly in conflict with the provisions of the organic law and invalid.

While there are other considerations and authorities bearing upon this question leading to the same result, yet, in view of the careful opinion of the learned appellate division and the recent decisions of this court relating to the history, purpose, and effect of the civil service statutes and the amendment of the constitution, we deem further discussion of this question quite unnecessary.

The order should be affirmed, with costs.

Parker, C. J., O'Brien and Haight, JJ., concur.

Bartlett and Vann, JJ., not voting.

Landon, J., not sitting.

Constitutionality of Civil Service Laws.

In General, it may be said that civil service acts are constitutional. The main and vital purpose of statutes of this character is to establish fitness as the basis upon which appointments to the civil service shall be made. In such a purpose and in the general machinery provided whereby the "merit system" is put into working operation, there is nothing which contravenes any constitutional right or guaranty: See *Chittenden v. Wurster*, 152 N. Y. 345, 40 N. E. 857; *People v. Kipley*, 171 Ill. 44, 49 N. E. 229; *Cahen v. Wells* (Cal., April 6, 1901), 64 Pac. 699; *Butler v. White*, 83 Fed. 578. The "merit system," as a system, is within the legitimate power of the legislature to establish. The constitutionality of acts directed to this end has been assailed chiefly through some special requirement which has rendered them invalid, or because they violate some peculiar provision of a state constitution.

Not a Delegation of Legislative or Judicial Power.—An act which empowers commissioners to make rules relative to the examination of candidates for appointment to office and rules for the selection of persons to fill offices which are required to be filled by appointment, is not a delegation of the power to enact laws. In *Opinion of the Justices*, 138 Mass. 601, it was deemed a mere delegation of administrative powers and duties, and the legislature could subsequently provide that such rules should be binding upon the officers and citizens to whom they were intended to apply. Similar holdings were made in *Butler v. White*, 83 Fed. 578; *People v. Kipley*, 171 Ill. 44, 49 N. E. 229.

In *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, the further objection was urged that the civil service act was unconstitutional because it conferred judicial powers on the commissioners. The statute in question provided that officers appointed under civil service rules should not be removed except for cause, and conferred power on the commissioners to investigate the charges, and as incident to such investigation that they should have power to administer oaths and subpoena witnesses. But the act further provided that to enforce these provisions, where a witness refused, and to compel his attendance or the production of books and papers, application must be made to the circuit court for an order to that effect. Hence, it was held that the judicial function was performed by the circuit court, and not by the commission, and the act did not confer judicial powers.

Fitness not an Illegal Test.—Many of the state constitutions provide that all civil officers shall take a certain oath before entering upon the duties of their office, and that "no other oath, declaration, or test shall be required as a qualification for any office of public trust." The civil service acts, requiring that applicants for appointive offices should show their fitness therefor by means of an examination given for that purpose, were attacked as providing an illegal test for office which was prohibited by the constitution.

Such objection as to the constitutionality of these acts has never been countenanced. The words "oath, declaration, or test," as used in state constitutions were deemed to be practically synonymous terms in *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; and this clause was construed as forbidding that any officer should be required to take or subscribe to any other declaration or test than the particular oath, whose terms were given. The word "test" was placed in the federal and state constitutions with reference to the struggles for liberty recorded in English history; it relates almost entirely to religious tests, and is aimed to prevent such tests as were at one time not uncommon in English statutes, and which even now are not unknown. This view was elaborately set forth by Peckham, J., in *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, 25 N. E. 274, where the judge also took a common sense view of the matter, when he said that "the idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office." The opinion concludes that no provision of the constitution was violated by a statute imposing a test aimed solely "to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office." This decision was approved by the Illinois supreme court in *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785.

Privileges and Immunities of Citizen.—The claim has been strenuously urged that the civil service acts deprive a person of the privileges and immunities guaranteed by the constitution of the United States, both in respect to the right of every citizen to hold office and in the right of officers to appoint their subordinates. But in *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785, these rights were held not to come within the meaning of "privileges and immunities of citizens of the United States," as used in the fourteenth amendment to the federal constitution. The privileges and immunities of the citizens of the several states, as used in section 2, of article 4 of the United States constitution, mean the personal and private rights of the citizen, and in no sense include the right to hold office. This case very clearly shows that the federal supreme court recognizes the right of a state to regulate its own offices, and to prescribe the terms and conditions upon which such offices shall be held.

What appeared to be a more serious objection was raised in *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, 25 N. E. 274. The New York statute provided for a bipartisan commission, in this manner, that no more than two of the three commissioners should belong to the same political party. It was contended that this deprived persons of their privileges as citizens and was an arbitrary

exclusion from office. But the court held that the act was so framed as to render every citizen eligible to hold the office of commissioner, each citizen standing on an equality with others of his class. The statute did not compel the appointment of even one member of any particular political party. The court distinguished this case from *Attorney General v. Detroit*, 58 Mich. 213, 55 Am. Rep. 675, 24 N. W. 887, where the statute recognized the existence of but two political parties, and required appointments to be made solely from those parties. If the New York law had been so framed it would have operated as an arbitrary exclusion from office of citizens not members of the political parties designated. This same New York case holds that the civil service act does not deprive one of his liberty without due process of law, even admitting that "liberty" includes the right to be eligible to hold office.

Power of Appointment.—The principal case discusses fully and satisfactorily the general question as to how far a civil service act may go to tie the hands of the real appointing power. One or two other phases of the question have been presented to the courts. In *Rogers v. Common Council of Buffalo*, 123 N. Y. 173, 25 N. E. 274, the question arose as to whether the power of appointment given to local officers was subordinated to the power of the state authorities by a provision in the statute requiring the local appointing authorities to prepare rules under which local officers should be appointed, such rules to go into effect only when approved by the state civil service commission. The court correctly held that the only purpose of the regulations was to establish efficiency and ascertain the fitness of candidates. The local authorities were still the sole appointing power, as well as the only persons who could, in the first instance, prescribe regulations. The duty of the state board was confined to the approval or rejection of such regulations, and in no manner interfered with the general power of the local authorities to appoint to office.

In *Brower v. Kantner*, 190 Pa. St. 182, 43 Atl. 7, an act which prohibited the discharge of Union soldiers from appointive positions without a reasonable cause was held to violate the provision of the Pennsylvania constitution which declared that appointed officers might be removed at the pleasure of the power by which they were appointed.

A recent decision of the California supreme court (*Crowley v. Freud* (April 6, 1901), 64 Pac. 696), involved the validity of certain portions of the civil service provision of the charter of the city and county of San Francisco. The charter in question attempted to confer power on the municipal civil service commission to prescribe the qualifications of deputies of certain county officers, such as sheriff and county clerk, and to compel those officers to select their deputies from persons named by the commission. The state constitution, section 8½ of article 11, gave to a consolidated municipal government of the character of San Francisco power over

county officers and their deputies only to the extent of providing for the manner of their election, and their terms of office and compensation. No power was granted by the constitution to such a municipality to prescribe the qualifications of the deputies of county officers. It was therefore held that the municipality had no power through its civil service commission to prescribe the qualifications of the deputies of county officers, and to compel those officers to select their deputies from persons named by the commission. This decision was by a divided court, three of the justices dissenting, and there is certainly much force in the dissenting opinion of Justice Van Dyke.

Relieving One Class of Citizens from Examination.—Several of the civil service acts have sought to favor honorably discharged Union soldiers and sailors who fought in the Civil War in the matter of appointments. This has been attempted in two ways: 1. By exempting such veterans entirely from taking examination; and 2. By preferring them in the making of appointments after they have passed the examination and been placed on the eligible list. The first method has very generally been declared unconstitutional, while the second is permitted in some states. To single out veterans of the Civil War and provide that they alone shall be freed from the necessity of taking examination to show their fitness to hold office, is to create a favored class, which in *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667, was declared to be contrary both to the letter and the spirit of the constitution, and hence void. And, in *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, a similar act which exempted Civil War veterans from civil service examination, and which made the appointment of veterans compulsory, if they desired appointment, whether they were competent or not to perform the duties of the office, was held to be unconstitutional as conferring absolutely upon veterans peculiar and exclusive privileges distinct from those of the community at large in obtaining public office: See, also, *Opinion of the Justices*, 145 Mass. 587, 13 N. E. 15. But an act which gives a discretion to the appointing power to appoint veterans to any position in the classified civil service, without examination, if in its opinion the public service requires this to be done, is constitutional: *Opinion of the Justices*, 166 Mass. 589, 44 N. E. 625.

Acts which give preference in appointment to office to honorably discharged Union soldiers and sailors who are qualified to fill the positions have been upheld: *State v. Miller*, 66 Minn. 90, 68 N. W. 732. Certainly, where the state constitution itself authorizes such preference, where the veteran otherwise proves himself fit by passing the civil service examination, the validity of such a preference cannot be questioned: *Matter of Keymer*, 148 N. Y. 219, 42 N. E. 667. But if the constitution prohibited laws granting special privileges to individuals or to a particular class of individuals, a provision of the civil service act requiring Civil War veterans to be

preferred in appointments to office would be invalid: *People v. Chicago Civil Service Commrs.*, 4 Chic. L. J. Week. 126. In Opinion of the Justices, 166 Mass. 589, 44 N. E. 625, where the constitution seems not to have created veterans into a favored class, a bare majority of the court held that a provision of the civil service law which declared that veterans who passed the civil service examination should be preferred in appointment to all male persons not veterans, was constitutional. Three of the justices dissented on the ground that the legislature had no power to fix as a decisive test for appointment to office anything which did not bear such a relation to the duties to be performed as would show special fitness for the performance of those duties, and the fact that one was a veteran rendered him no more competent or fit to hold office than another who had passed the civil service examination.

Free Speech.—The act of Congress of January 16, 1883, relating to civil service, prohibited all persons, whether in the employ of the United States or not, from soliciting contributions for political purposes from any government employé in any government building or other place mentioned in the act where government business was transacted. It was sought to overthrow this provision of the act as an abridgment of the freedom of speech and as a restraint on the liberty of the individual citizen. But the act was sustained, and the court in *United States v. Newton*, 20 D. C. Rep. 226, held that Congress had authority to prescribe rules of conduct to be observed by its employés while they were engaged in transacting government business in government buildings, and that similar rules could be made for citizens who visited such places. A somewhat similar provision in the act of Congress of August 15, 1876, was sustained by the supreme court in *Ex parte Curtis*, 106 U. S. 371, 3 Sup. Ct. Rep. 381, Chief Justice Waite in his opinion saying that: "The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly, such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end."

Penalties.—There appears to be no constitutional objection against providing penalties for a violation of the provisions of a civil service law: See Opinion of the Justices, 138 Mass. 601; *Ex parte Curtis*, 106 U. S. 371, 3 Sup. Ct. Rep. 381; *People v. Loeffler*, 175 Ill. 585, 611, 51 N. E. 785; though such a law cannot confer judicial power on civil service commissioners to punish for contempt by reason of a disobedience of their orders: *People v. Kipley*, 171 Ill. 44, 49 N. E. 229.

AULTMAN & TAYLOR COMPANY v. SYME.

[163 N. Y. 54, 57 N. E. 168.]

TIME—COMPUTATION OF, WHEN YEARS ARE INVOLVED.—A statute providing that “the day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning,” is not applicable when years are to be computed.

EXECUTIONS—ISSUANCE OF, BY WHAT LAW CONTROLLED.—The issuing of an execution is governed by the law in existence at the time of its issuance.

IN COMPUTING THE TIME WITHIN WHICH AN EXECUTION MAY ISSUE, the first day should be counted, unless there is a statute prescribing otherwise.

EXECUTION ISSUED WITHOUT LEAVE AFTER THE LAPSE OF FIVE YEARS is not void, but only liable to be set aside on motion.

William H. Blymyer, for the appellant.

Edward F. Brown, for the respondents.

55 WERNER, J. The plaintiff brought a creditor's action to set aside an assignment made by the defendant Frederick J. **56** Syme and his wife, the defendant Mary A. Syme, of the interest of the former in the residuary estate of his uncle, David H. Syme.

The court below held that the evidence was insufficient to sustain the conclusion of the trial court that said assignment was fraudulent; also, that the execution on plaintiff's original judgment was issued without leave after the statutory period of five years, and was, therefore, void.

As this view of the case left the plaintiff no foundation for the present action, the complaint was dismissed. The question whether said execution was issued within five years from the recovery of plaintiff's original judgment depends upon the method of computing time from that event. If the day of the recovery of the judgment is included in the statutory period, then the execution was not issued “within five years after the entry of judgment”; if that day is excluded, it was issued in time. Both parties invoke the provisions of the statutory construction law in aid of their conflicting contentions upon this question. That law (Laws 1892, c. 677, as amended by Laws 1894, c. 447), so far as applicable here, declares that (sec. 27): “The day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning.” No similar provision is made

for the computation of years. Under section 25 of this act we find two definitions of a year: "The term 'year' in a statute, contract, or any public or private instrument, means three hundred and sixty-five days. . . . In a statute, contract, or public or private instrument, the term 'year' means twelve months." The late general term of the first department, in a previous litigation between the parties to this action (*Aultman etc. Co. v. Syme*, 91 Hun, 632, 36 N. Y. Supp. 528), held that under this statute the rule which governs days, weeks, and months is not applicable to periods of years. The appellate division of the second department in *Connecticut Nat. Bank v. Bayles*, 17 App. Div. 596, 45 N. Y. Supp. 305, decided that the statutory rule for reckoning days, weeks, and months was equally applicable to periods of years.

In the effort to ascertain which of these two rules should be applied, let us first examine the question in the light of the statute as it now stands. It specifically declares that "the day from which any specified number of days, weeks, or months is reckoned shall be excluded in making the reckoning." The statute makes no provision for computing periods of years. It is urged for the appellant that we may supply by implication the rule which is specifically provided for the computation of days, weeks and months. Upon this assumption it is said that as a year is composed of twelve months, the designation of "months" among the periods which are within the rule is equivalent to including "years" as well. The difficulty with this argument lies in its hostility to a fundamental principle of statutory construction.

Expressio unius est exclusio alterius applies to a case like this. While this maxim will not be permitted to defeat the obvious legislative intent where it conflicts with the letter of a statute, such intent must, nevertheless, be discernible in the context of the statute itself.

As has been observed, the law under consideration contains no other reference to the method of computing time than that above referred to. Had the legislature intended to apply that method to periods of years, it could have disposed of the whole subject in a single sentence by saying that the day from which any specified period of time is to be reckoned shall be excluded from the reckoning. But it did not say that. The silence of the statute in this regard is, therefore, significant of the legislative intent to exclude from its operation other periods than those enumerated. We do not think that this rule of statu-

tory construction is rendered inapplicable because, as suggested on behalf of the appellant, a "year" and "twelve months" are, for all practical purposes, one and the same thing. A year, twelve months, fifty-two weeks, and three hundred and sixty-five days all denote the same total period of time. If the statute had simply provided that the "day" from which any specified number of "days" is reckoned shall be excluded from the reckoning, it could hardly be contended that because there are three hundred and sixty-five days in a year, therefore, ⁵⁸ the legislature intended to apply the same rule of computation to years as to days. But there would be quite as much force in such a contention as there is in the argument that because a year is composed of months the same rule must apply to both. It is to be observed, moreover, that the question under consideration has to do, not with a single year, but with years. The appellant's argument, carried to its logical conclusion, amounts to this: A year consists of twelve months; therefore, the rule as applied to months holds good for any period of years. It may be admitted, for the purposes of this discussion, that a divided or double rule of computation has its inconveniences and difficulties; so has every other. All rules for computing time are purely arbitrary. If it were not for the terms of the statute and the rights which have become fixed by virtue thereof, one rule would, perhaps, be as good as another. So much for the statute as it now exists. Let us examine its history.

In 1830 the legislature first enacted a law for the computation of time. This statute did not furnish a rule for computation, but simply defined the legal meaning of the terms "years," "months," etc.

In 1848, by chapter 379 of the laws of that year, the legislature adopted what was known as the Code of Procedure. Section 368, which constitutes chapter 10 of that code, provided: "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." This section, without change, was embraced in the amended Code of Procedure adopted in 1849, but from that time until 1877 it was known as section 407 of the Code of Procedure.

In 1877 the legislature adopted the Code of Civil Procedure. Section 788 of that code provided that "the time within which an act, in an action or special proceeding, brought as specified

in the last section, is required by law to be done, must be computed by excluding the first, and including the last, day, except where it is otherwise specially prescribed by ⁵⁹ law. If the last day is Sunday, or a public holiday, it must be excluded. Where the act is required to be done within two days, and an intervening day is Sunday, or a public holiday, it must also be excluded." This section remained a part of the code until it was expressly repealed by the statutory construction law: Laws 1892, c. 677.

An examination of all the codes referred to reveals the fact that they contained the usual provisions relating to the periods of time within which acts of legal practice were required to be performed. Among these were the sections containing what are familiarly known as the statutes of limitation and those relating to the enforcement of judgments. Then, a party recovering a judgment could, as he may now, issue execution thereon as of course at any time within five years after the entry of judgment.

Referring again to said section 368 of the Code of Procedure (afterward 407), it will be observed that the rule of computation therein set forth referred to acts to be done as therein provided. The rule thus laid down was somewhat circumscribed by section 788 of the Code of Civil Procedure, which limited the rule for computing time to acts required by law to be done "in an action or special proceeding." It is perfectly plain, therefore, that under the several codes as they existed from 1848 to 1877, the time within which all acts to be done as therein provided was to be computed by excluding the first day and including the last. This clearly embraced the issuance of an execution, as of course, within five years after the rendition of the judgment upon which it was based. If we assume that the issuance of an execution upon a judgment is an act "in an action or special proceeding," then the issuance of an execution within five years was still governed by the same rule of computation under said section 788 of the Code of Civil Procedure as under the previous codes. But by chapter 677 of the Laws of 1892, said section 788 of the Code of Civil Procedure was repealed. In the effort to enact a rule for the computation of time which would be applicable to all statutes, legal proceedings, and contracts, ⁶⁰ the commissioners of statutory revision omitted by a single word to make the statute as broad as their report said it was intended to be. If we apply the ordinary rules of statutory construction, we must clearly hold that by the repeal of the provisions of the Code of Civil Procedure, above

referred to, the rule for the computation of time, which was thereby made applicable to all legal proceedings provided for in the code, was also repealed. As the issuance of an execution relates to the remedy and not to the right of a party recovering a judgment, it is governed by the law in existence at the time of its issuance.

We therefore return to the consideration of the statute as it stands. As we have already suggested, the well-known and settled rules of statutory construction require us to hold that the terms "days, weeks, and months" do not include "years." On the contrary, the very omission to specify years, as among the periods to be governed by the rule which is made applicable to the shorter periods, seems to furnish the strongest ground for the exclusion of the longer period from its operation. But let us look a little further and ascertain to what extent, if at all, this question is affected by other considerations than those which are presented by this statute and its history.

By reference to the Code of Civil Procedure, we find that section 1239 requires county clerks to make a minute on the back of each judgment-roll "of the time of filing it, specifying the year, month, day, hour, and minute."

Section 1245 requires such clerks to docket each judgment "in its regular order and according to its priority."

Section 1246 requires such clerks, when entering a judgment, to note "the day, hour, and minute when the judgment-roll was filed, and the day, hour, and minute when the judgment was docketed."

Section 1251 provides that "a judgment . . . binds, and is a charge upon, for ten years after filing the judgment-roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has," etc.

These sections of the code make it apparent that a judgment ⁶¹ creditor is first entitled to an execution upon his judgment at the moment when the judgment-roll is filed and the judgment is docketed; and a judgment becomes a lien upon the judgment debtor's real property and chattels real from that time. The law does not recognize fractions of days. The day on which a judgment is docketed, therefore, becomes the first day of its existence. While these provisions of the code refer and relate primarily to the priority of judgments, the time when execution may issue and when the creditor's lien attaches, it is manifest that, in the absence of some statutory rule to the contrary, they also fix the time when periods of limitation begin

to run, unless we can say that a judgment may be in force on one day for one purpose, and not be alive until the next day for another purpose.

As we have seen, there is nothing in the statutory construction law which requires or permits such a result, unless we have power to supply, by implication, the manifest omissions in the letter of the statute. But it seems to us that these practical difficulties cannot be overcome by implication. They will yield to nothing less than an arbitrary and positive statutory mandate. In the absence of such a guide, the leadings of logic and consistency point more strongly in the direction of a rule which will be productive of harmonious results in all questions affecting the existence and enforcement of judgments than toward an arbitrarily uniform rule for the computation of time.

But it is said that the cases in this and other jurisdictions in this country evince an almost uniform tendency on the part of the courts to so construe statutes of limitation as to give parties the longest time in which to assert rights or perform obligations. That there is such a tendency in some jurisdictions other than our own may be admitted without subscribing to the manifold inconsistencies upon which it rests. In the effort to adjust the rules applicable to statutes of limitation to the equities of particular cases, many courts have lost sight of these rules altogether, while others have sought to fortify their conclusions by the citation of authorities ⁶² resting upon clearly distinguishable grounds. As a result, there is a great diversity and confusion among the cases, but unless we are prepared to follow this tendency without regard to reason or principle, we must, in the absence of a statutory rule to the contrary, hold that the periods of limitation relating to judgments begin to run from the moment of their existence. Since the law, as we have seen, ignores fractions of days, this seems to be the logical and necessary result. The first day must be counted unless there is a statute which otherwise provides. For the purpose of illustrating, not only the hopeless confusion into which the courts have drifted upon this subject, but also the points of difference between the question before us and those decided in some of the cases relied upon by the appellant, we will briefly analyze a few of them. We will first examine the decisions in other jurisdictions.

In *Griffith v. Bogert*, 18 How. 158, the statute there under consideration provided that an action should not be commenced

after the expiration of eighteen months from the specified event. It was held that the first day should be included. This was decided to be the common-law rule. The court, however, added: "If the statute in question were one of limitation, whereby the remedy of the creditor would have been lost unless execution had issued and sale had been made within eighteen months, probably a different construction might have prevailed. Yet even in such cases the precedents differ."

In *Arnold v. United States*, 9 Cranch, 104, where it was contended that a statute did not take effect until the day after its passage, it was held that, as a general rule, "where the computation is to be from an act done, the day on which the act is done is to be included."

In *Perry v. Providence Life Ins. etc. Co.*, 99 Mass. 162, an insurance policy provided for defendant's liability if the insured should die within ninety days from the happening of the injury; held that the day of the accident should be included.

In *Taylor v. Brown*, 147 U. S. 640, 13 Sup. Ct. Rep. 549, the supreme court construed the statute prohibiting the conveyance of lands ⁶³ owned by Indians for a period of five years from the issuance of a patent therefor. The day of such issuance was included and the court said: "While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the terminus a quo is not absolute, but that it may be included when necessary to give effect to the obvious intention."

In *Dutcher v. Wright*, 94 U. S. 553, the court, in computing the four months preceding the filing of a petition in bankruptcy, excluded the day of filing and said: "It must be admitted that it is difficult, if not impossible, to deduce from the reported decisions any rule that will apply to all cases."

In *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470, it was held that in computing time from the day, or from the day of the date, or from a certain act or event, the first day is to be excluded unless a different intention is manifested by the instrument or statute under which the question arises.

In *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249, the question arose upon the presentation of claims within six months from the issuance of an order of the probate court; held, that the day of the issuance of the order should be excluded.

In *Chaddock v. Barry*, 93 Mich. 542, 53 N. W. 785, the statute provided that the service of summons issued by justices of the peace should be at least six days before the time of ap-

pearance named therein; held, that the day of service should be excluded and the appearance day included. To the same effect is *Shelton v. Gillett*, 79 Mich. 173, 44 N. W. 428.

In *Cromelien v. Brink*, 29 Pa. St. 522, it was held that where a statute provides two years in which to redeem lands from tax sales, the day of the sale should be excluded.

Brown v. Chicago, 117 Ill. 21, 7 N. E. 108, was a case in which the statute required ten days' notice of a special assessment; and it was held that the day of the publication of the notice was to be excluded in computing the time.

McCulloch v. Hopper, 47 N. J. L. 190, 54 Am. Rep. 146, was an action for money in which the six years' statute of limitations was applied; held, that the day of the terminus a quo was to be excluded.

⁶⁴ In *Hagerman v. Ohio Bldg. etc. Assn.*, 25 Ohio St. 187, it was held that in computing the time for which a notice of sale on execution should be advertised before the day of sale, the day on which the notice was first published may be included and the day of sale must be excluded.

In *Koltenbrock v. Cracraft*, 36 Ohio St. 585, it was held that when a statute which repeals a prior statute on the same subject is to take effect from and after the day named, it does not take effect until the expiration of the day named.

In this state there is less of conflict in the cases than there is in other states. This is probably due to the fact, in part at least, that from 1848 to 1892 all legal proceedings embraced within the provisions of the code were governed by the rule for the computation of time therein contained, but aside from the statutory history of this subject, a glance at the cases in this state is sufficient to show that appellant's contention does not, as is claimed, rest upon undoubted authority. On the contrary, no case is brought to our attention which cannot easily be differentiated from the case at bar.

The case of *Mygatt v. Washburn*, 15 N. Y. 317, was brought to recover damages against an assessor who had illegally assessed the plaintiff for personal property. Among other defenses, that of the six years' statute of limitations was interposed. Without attempting to explain the theory upon which it proceeded, this court held that, excluding the day on which the act complained of was done, and including the other, the action was commenced within six years, and, therefore, not barred by the statute. It is quite evident, however, that the rule there applied was in conformity with that adopted in

Cornell v. Moulton, 3 Denio, 12, Osborn v. Moneure, 3 Wend. 170, Davison v. Budlong, 40 Hun, 215, and McGraw v. Walker, 2 Hilt, 404. These were actions upon promissory notes, in which it was held that the statute did not begin to run until the day after the date when the notes fell due.

In Morss v. Purvis, 68 N. Y. 225, Snyder v. Warren, 2 Cow. 518, 14 Am. Dec. 519, and People v. Sheriff, 19 Wend. 65 87, it was held that a judgment debtor whose lands have been sold under execution is entitled to the full redemption period of one year, and, therefore, the day of the sale must be excluded from the computation.

Buchanan v. Whitman, 151 N. Y. 253, 45 N. E. 556, was an action arising upon a lease under which the practical construction given to it by the parties was permitted to control the expiration of the term. Then there are cases relating to legal practice, of which the following are examples: Taylor v. Corbierl, 8 How. Pr. 385; Ex parte Dean, 2 Cow. 605, 14 Am. Dec. 521; Hoffman v. Duel, 5 Johns. 232; Irving v. Humphreys, Hopk. Ch. 364; Vandeburgh v. Van Rensselaer, 6 Paige, 147; People v. New York etc. R. R. Co., 28 Barb. 284; Haden v. Buddensick, 49 How. Pr. 241; Marvin v. Marvin, 75 N. Y. 240.

The cases last cited, with one or two exceptions, which do not affect the questions at issue, all relate to matters of practice in actions or special proceedings involving short periods of time which were clearly governed by the code provisions as they existed from 1848 to 1892.

It will thus be seen that we cannot hold that the statutory construction law was intended to provide for a uniform rule for the computation of time, including "years" as well as "days, weeks, and months," unless we ignore the statute as well as the ordinary rules of statutory construction. Under existing conditions this can be accomplished only on the theory that what ought to be shall be. This is not the rule by which statutes are to be construed. We therefore conclude that the plaintiff's execution was not issued within five years. But it does not follow that plaintiff's execution was fatally defective. On the contrary, an execution issued without leave, after the lapse of five years, is not void, but only liable to be set aside on motion: Bank of Genesee v. Spencer, 18 N. Y. 150-154; Union Bank of Troy v. Sergeant, 53 Barb. 424.

In this it differs from an execution against a deceased person, which is an absolute nullity: Prentiss v. Bowden, 145 N. Y. 342, 40 N. E. 13.

⁶⁶ We think, therefore, that it was error for the appellate division to dismiss the complaint. The judgment of the court below should be modified so as to grant a new trial instead of dismissing the complaint, and, as so modified, affirmed, without costs of this appeal to either party.

CULLEN, JUDGE, DISSENTED. He maintained that the statute declaring that "the day from which any specified days, weeks, or months of time is reckoned shall be excluded in making the reckoning," was equally applicable when the computation of years was involved; that the almost uniform tendency of the courts had been in cases of doubt to adopt that interpretation which gave the party the longest time in which to assert a right or perform an obligation: *Vandenburgh v. Van Rensselaer*, 6 Paige, 147; *Snyder v. Warren*, 2 Cow. 518, 14 Am. Dec. 519; *Ex parte Dean*, 2 Cow. 605, 14 Am. Dec. 521; *Homan v. Liswell*, 6 Cow. 659; *People v. Sheriff of Broome*, 19 Wend. 87; *Cornell v. Moulton*, 3 Denio, 12; *Davison v. Bodlong*, 40 Hun, 245; *Mygatt v. Washburn*, 15 N. Y. 316; *Morss v. Purvis*, 68 N. Y. 225.

COMPUTATION OF TIME is the subject of the monographic note to *State v. Michel*, 78 Am. St. Rep. 372-386.

EXECUTION ON A DORMANT JUDGMENT is irregular merely, and not void: *Sherrard v. Johnston*, 193 Pa. St. 166, 74 Am. St. Rep. 680, 44 Atl. 252; *Eddy v. Coldwell*, 23 Or. 163, 37 Am. St. Rep. 672, 31 Pac. 475; *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46, 14 South. 777; *Gardner v. Mobile etc. R. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84, 15 South. 271. Compare *Davis v. Comer*, 108 Ga. 117, 75 Am. St. Rep. 33, 33 S. E. 852.

MATTER OF TUTHILL.

[163 N. Y. 133, 57 N. E. 303.]

CONSTITUTIONAL LAW—TAKING OF PROPERTY FOR PRIVATE PURPOSES.—The sovereign power is incapable of conferring any right to interfere with private property except for public objects, and the right to do so cannot be conferred by an amendment to the constitution.

CONSTITUTIONAL LAW—DRAINAGE OF PRIVATE PROPERTY.—A constitutional amendment declaring that general laws may be passed permitting owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches, and dikes on the lands of others, under proper restrictions and with just compensation, is itself unconstitutional, because in conflict with the provisions of the fourteenth amendment to the national constitution.

EMINENT DOMAIN—PUBLIC USE.—WHETHER THAT IS A PUBLIC USE for which private property is authorized to be taken depends upon the object aimed at and whether the plan has

such an obvious or recognized character of public utility as to justify the exercise of the right of eminent domain or of taxation in its favor.

John G. Milburn and F. V. Sanford, for the appellants.

Henry Bacon and Joseph Merritt, for the respondents.

135 GRAY, J. This was a proceeding instituted by the petitioners for the purpose of causing certain low and wet lands, in the county of Orange, in this state, of which they were the owners, to be drained through ditches to be constructed over the lands of others, and the warrant for its commencement and for the various steps which have been taken is claimed to be found in chapter 384 of the Laws of 1895. The act provided, in its first section, that "a person owning agricultural lands within this state may institute proceedings for the drainage of such lands or the protection thereof from overflow, by the construction and maintenance of a drain or dike, on the lands of another person, or the use of mechanical devices, by presenting a verified petition to the county court of the county in which such lands are located, or, if in more than one county, to a special term of the supreme court of the district where the lands or a part thereof are situated, setting forth a general description of the lands to be drained or protected, **136** the names and places of residence of the owners of all lands affected by the proceeding, so far as the same can with reasonable diligence be ascertained, and a prayer for the appointment of three commissioners." Other sections provide for the service of a notice of the time and place of the presentation of the petition and regulate matters of procedure. They provide for the appointment of three disinterested and resident commissioners, who are to hear the parties and determine whether the lands shall be drained; whether for that purpose it is necessary that a drain shall be opened through the lands of another; what the amount of damage, if any, sustained by other land owners by reason of the opening of the drain and any other and further steps with reference to the proceeding. They provide for the organization of the commissioners as a board, and, after viewing the premises and taking proofs, for a determination as to the necessity for the opening of the drain as prayed; for the filing of that determination and for publication of a notice thereof; for further proceedings thereafter in the making of maps and surveys; for the construction of the work, and, in the case of an inability to agree upon the amount of compensation and damages, for the determination thereof

by the commissioners and an assessment upon the lands to be benefited. The commissioners are to take into account any benefits accrued, and may deduct the amount of the benefit from the amount of the damage. The damages and expenses are to be assessed in proportion to the amount of benefit received. Notice is to be given to the persons whose lands are affected and who have appeared on a hearing upon the assessment, and thereafter a corrected assessment-roll is to be filed and personal notice thereof given. Provision is made for an application by the commissioners for judgments against any persons not having paid the assessment, and such judgments shall be docketed and become a lien upon lands, enforceable as provided in such cases by the Code of Civil Procedure. As briefly as possible, this survey of the act presents its principal features.

137 The petitioners in this proceeding followed the procedure of the act, and commissioners were appointed by the county court, who determined in favor of the drainage prayed for and as to its manner, and who borrowed moneys, under orders of the county court, and caused the ditches to be constructed. They made an assessment of the damages and expenses upon the lands of various persons, including these respondents, and gave notice of a hearing of any person aggrieved by the same, which was had and a corrected assessment-roll was thereafter made and filed. Subsequently, application was made by the commissioners to the county judge for an order directing the entry of judgments against various land owners, who had not paid their assessments, which was granted. These respondents, who opposed the assessment and the application of the commissioners for the judgments, appealed from the order of the county judge and from the judgments entered thereupon to the appellate division, where the order and the judgments were reversed and the proceeding was dismissed, upon the ground, in substance, that the act of 1895 was unconstitutional for authorizing the exercise of the power of taxation in favor of a single person. The commissioners and certain of the petitioners then appealed to this court.

The question which we have before us involves, primarily, the consideration of the amendment of section 7 of article 1 of the state constitution, adopted in 1894, which is relied upon as validating the enactment by the legislature of the drainage act of 1895. The section of the constitution referred to reads, in its entirety, as follows: "When private property shall be taken for any public use, the compensation to be made there-

for, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses ¹³⁸ of the proceeding, shall be paid by the person to be benefited. *General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches, and dikes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.*" The portion of the section italicized contains the amendment in question, and it is objected to it that it is violative of the federal constitution, in that the taking of private property for a use, not public, but strictly private, is authorized by the exercise of the right of eminent domain.

If the amendment is in conflict with any of the provisions of the federal constitution, it must fail; for, within its sphere of operation, that instrument is supreme, and no more by constitutional provisions than by legislation can the states of the Union override its prohibitions. It is an ancient principle, which entered into our social compact, that the use for which private property may be taken must be a public one, whether the taking be by the exercise of the right of eminent domain, or by that of taxation. The sovereign power is incapable of conferring any right to interfere with private property, except it be needed for public objects. To take land for any other than a public use, to take it from one citizen and to transfer it to another, even for full compensation, would be to violate the contract by which the land was originally granted by government: *Beekman v. Saratoga etc. R. R. Co.*, 3 Paige, 45, 73, 22 Am. Dec. 679; *Bloodgood v. Mohawk etc. R. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313.

The fourteenth amendment of the federal constitution, in prohibiting a state from depriving any person of life, liberty, or property without due process of law, protects the citizen against the taking of his property for any other than a public use, either under the guise of taxation, or by the assumption of the right of eminent domain: *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 158, 17 Sup. Ct. Rep. 56. It is a security against

the arbitrary spoliation of property, or any abridgment of the immunities of citizens of the United States. The state constitution, ¹³⁹ from the beginning, by authorizing the appropriation of private property for public use, impliedly declared that for any other use private property should not be taken from one and applied to the private use of another: *Matter of Albany Street*, 11 Wend. 149, 25 Am. Dec. 618.

It was observed by Judge Denio, in *People v. Smith*, 21 N. Y. 598, that it would not be due process of law to "appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use." Whether that is a public use, for which private property is authorized to be taken, will depend upon the object aimed at, and whether the plan has such an obvious, or recognized, character of public utility as to justify the exercise of the right of eminent domain, or of the power of taxation, in its favor. I suppose, in that consideration, when some new constitutional provision is in question, regard should be had to prior conditions in the laws and in the decisions of the courts of the state upon the subject, which illustrate some settled policy of the community. That can be understood by reference to the cases which arose under the mill acts in the New England states, the irrigation acts in the western states and the drainage statute of New Jersey: *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. Rep. 441; *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. Rep. 1086; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56. The statutes in those cases were justified, either in view of a policy in force prior to the adoption of the state constitutions, or, within a similar principle, by long exercise of a legislative power which the state courts had sustained. In *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. Rep. 1086, the New Jersey drainage statute discussed was framed in the public interest. It authorized the board of managers of the geological survey, "upon the application of at least five owners of separate lots of land, etc.," to examine the tract, and, if they deemed it for the interest of the public and the land owners affected thereby, to adopt a system of drainage and to report it to the supreme ¹⁴⁰ court of the state, etc. It was observed in the opinion that several drainage laws and the assessment of the expense of the work upon all the lands in the tract in question, "have long existed in the state of New Jersey

and have been sustained and sanctioned by the courts under the constitution of 1776, as well as under that of 1844"; and the case was held to come "within the principle upon which this court upheld the validity of general mill acts in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. Rep. 441." In *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, the California irrigation act was upheld, in view of the various enactments, constitutional and legislative, together with the decisions of the state court, that such a use of water was a public one. It was observed that they were not binding upon the court; but, in their light, and under the facts and circumstances surrounding the subject matter, in regard to which the use was questioned, there could be little difficulty in arriving at the same conclusion as the California court. The provision for the opening of private roads, in the constitutional section under consideration, represented a public policy dating from 1772, when the first statute upon the subject was enacted. This statute continued in full and active operation as a law of the state upon the adoption of our constitution in 1777, which continued such parts of the common law in force as had formed the law of the colony. It was embodied in the Revised Statutes (1 Rev. Stats., secs. 54, 77, 79, p. 513), and then, in 1846, was added to the constitution. It was an evident public policy of the state, long acquiesced in, that facilities should be furnished for private ways, so that the property of citizens might be made accessible: *Satterly v. Winne*, 101 N. Y. 218, 225, 4 N. E. 185. Judge Cooley, in his work on Constitutional Limitations, *532, observed that the common law has never sanctioned an appropriation of property upon such considerations as the improvement and cultivation of the wild lands of the state, the drainage of low lands, etc., and that some further element must be involved before the appropriation can be regarded as sanctioned by our constitutions. He further remarked that: "The reason of the case and the settled ¹⁴¹ practice of free governments must be our guides in determining what is, or is not, to be regarded as a public use."

In this state, prior to the adoption of this constitutional amendment, a general drainage law appeared in the Revised Statutes: 2 Rev. Stats. 548; but it was very early declared by this court to be unconstitutional, as authorizing the taking of the property of the owner of the land and transferring it to the applicant for the ditch against the consent of the owner: *Gilbert v. Foote*, not reported, but cited in *White v. White*, 5

Barb. 483, in 1849, and referred to in *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88. It was said of *Gilbert v. Foote*, by Judge Folger, in *Ryers' case*, that, "it is understood that the judgment of this court went mainly upon the ground that the act sought to permit the taking of private property for a private use, which was not a use for a private way." In 1869 a general act for the drainage of swamps and the like was passed (Laws 1869, c. 888), the constitutionality of which was challenged in *Ryers' case*. It contained a provision that the commissioners appointed by the court upon the application of the petitioners should determine, not only the question of the necessity of the ditch for the drainage purposes, but "whether it is necessary for the public health," and other provisions restricted the purpose of the proceeding to that of the benefit of the public health. Such provisions were, doubtless, inserted in amendment of the prior general drainage statute and to obviate the objection to its constitutionality: *Matter of Draining Swamp Lands, etc.*, 5 Hun, 116. The opinion of this court in *Ryers' case* proceeded upon the proposition of the right to take private property for public use, making due compensation therefor, and that the maintenance and promotion of the public health were matters of public concern. It was held to be a constitutional power of legislation to provide for removing or abating that which has become a public nuisance, injuring the public health. "We are not called upon in this case," Judge Folger observed, "to uphold an act which has for its purpose the benefit of individuals. As before said, it avows, and avows only, a public purpose. . . . ¹⁴² We wish to be distinctly understood that we sustain this act as constitutional solely, for that it plainly has for its purpose the preservation and promotion of the public health." A reading of the act of 1869 makes it perfectly apparent that within its scope the object of drainage proceedings was confined to cases where they were demanded in the interest of the public health.

It must be conceded, therefore, that, up to 1894, such a drainage proceeding as would be authorized under this amendment to our constitution, being for a private purpose, was neither sanctioned by the laws, nor upheld by the courts. The policy of the state, thus evidenced, was manifestly founded on the sanctity of private property rights under the social compact, and was adverse to any legislation which would violate it. It was well within the legislative power to make the state the sole actor and in the interest of a public necessity, or convenience,

to authorize such interference by the public authorities with private rights as would abate conditions prejudicial to the health or comfort of the community, or to authorize private persons to take the initiative in the same direction of public utility. In the drainage statute in question in *People v. Nearing*, 27 N. Y. 306, for instance, the legislature appointed the commissioners to drain the wet and swamp lands of the town of Cicero and directed their procedure. The state was the actor in the matter, and thus the presumption of a public purpose or necessity was conclusively furnished. The legislative action was similar in the acts referred to in *Hartwell v. Armstrong*, 19 Barb. 166, and in *People v. Jefferson Co. Court*, 55 N. Y. 604. But, lacking public ends, I find nothing in the past political history of the state which would justify laws by which a citizen may be authorized to take the property of his neighbor, by the exercise of the right of eminent domain, for a purpose which is primarily for his private benefit, although, incidentally, of such possible benefit generally, as any improvement of agricultural lands would result in. Such legislation is not sound in principle, and we are not embarrassed by any long acquiescence, ¹⁴³ or by either judicial or legislative precedents, in so asserting, or in holding that no imperative reasons of public policy warrant the delegation of the power to exercise the right of eminent domain in such cases.

When the constitution of this state was amended in this way by the people, in 1894, it was intended, undoubtedly, by embodying in the organic law an authorization for the passage of general laws permitting owners of agricultural lands to construct and maintain ditches for the drainage of their properties, to conclusively sanction such legislation thereafter. The probable intent of any law may often be stated from a consideration of the political conditions which existed, the presence of which might be deemed, not unnaturally, to operate upon the law-makers. An amendment of the organic law of the state represents the expression of the dominant popular sentiment upon the subject, and in this instance it undoubtedly represents a purpose to make that lawful which before was not. The reasoning would be that, if it was unconstitutional and, therefore, unlawful before to authorize the taking of private property for the private purpose of the drainage of agricultural lands, by giving it constitutional warrant it would become lawful to do so; if, indeed, the plan might not be perforce invested with a public interest. But this result would, and should, not be at-

tained, if the constitutional amendment was in conflict with those provisions of the supreme law of the land, embodied in the federal constitution, which guarantee the citizen against the taking of his life, liberty, or property without due process of law. The amendment of our constitution does not, in terms, declare its object to be a public one. Indeed, I think that its language, by a fair reading, rather negatives such an inference, and imports that the object is the private benefit of the land owner; for the purpose is stated to be the drainage only of his lands, and he is to make just compensation for the land appropriated to that purpose. I conceive the proper rule of construction to be that, if the amendment expressed a purpose theretofore recognized as public, it would afford that sufficient sanction for subsequent legislation ¹⁴⁴ on the subject which might be needed. But, if the object had been theretofore deemed not of a public nature, or of public concern, and it touches some personal immunity secured by the law of the land, its presence in the constitution will not have the effect of removing the fundamental objection to it. I do not believe that the people of the state can affect, or impair, the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose which is essentially of private benefit, and which has always been held to be such. When the amendment says that "general laws may be passed permitting the owners and occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, etc.," it means that the legislature may authorize any such person to take another's land for a purely private purpose, and that is in conflict with the inhibition of the bill of rights and violates the guaranties of the federal constitution. If the citizen invokes the guaranties of the federal constitution for his protection against the enforcement of a law, which an amendment of the state constitution purports to authorize, I perceive no valid reason, if he is right in his claim to protection, that we should not recognize it. I am not able to resist the conclusion that the constitutional amendment in question is invalid and inoperative.

If, however, the amendment in question can be upheld as valid, upon the assumption that it removes a constitutional limitation upon legislation providing for the drainage of agricultural lands, and that it can rest for its justification upon a common local necessity, independent of the public health, and concerning the promotion of the prosperity of the community,

then it seems clear to me that it affords no warrant for the enactment of this drainage law. The section of the article of the constitution to which the amendment was added prescribed the tribunal which shall ascertain the compensation to be made for the private property "taken for any public use," and then proceeded to provide for the opening of private roads ¹⁴⁵ and that the payment of the amount of the damage to be sustained by their opening and the expense of the proceeding "shall be paid by the person to be benefited." In this extension of the law of eminent domain to such a case, in the constitution of 1846, there was to be no assessment of damages and expenses upon the nonassenting owners of the lands taken for the private road, and the act passed in 1853 by the legislature, regulating the procedure, strictly followed the constitutional requirement in that respect: Laws 1853, c. 174, sec. 14. When the amendment under consideration was added in 1894, by the force of its own language, as by necessary implication from its association with the other provisions of the section, the plain intent was that the land owner seeking to construct a drain through other lands, in invitum their owners, should make compensation for the land appropriated and himself bear the expense. The only general laws authorized were those "permitting the owners and occupants of agricultural lands to construct . . . for the drainage thereof necessary drains, etc., upon the lands of others, under proper restrictions and with just compensation." This language is not susceptible, by any fair reading, of a construction which warrants the assessment upon the land owner proceeded against of a proportionate share of the damages and expenses. The constitution, as an instrument framed by the people for the regulation of the government, should be read with the usual significance given to words and phrases by persons of ordinary intelligence, and nothing should be implied which would add to the individual burden, or which would be in further derogation of individual rights. That which the words declare is the meaning of the instrument, and neither courts nor legislators have the right to add to, or take from, that meaning: *Newell v. People*, 7 N. Y. 9, 97. If the amendment is so read, it only authorizes laws which will enable an agricultural land owner, desirous of draining his lands, to exercise the right of eminent domain and thereunder to appropriate another's lands for the purpose, under such restrictions as shall be deemed proper to be made and ¹⁴⁶ upon his making due compensation. No right is conferred, or implied, to assess a portion of the cost

and expense upon the other land owners. Nor could it authorize such an assessment without violating the federal constitution; for that would be to authorize the levying of a tax for a private purpose.

In the enactment of the drainage law of 1895, the legislature went far beyond the terms of the constitutional warrant; for the act provided, in addition to the exercise of the right of eminent domain, that a petitioner might compel the cost of the proceeding and of the work to be apportioned between all land owners deemed benefited by the commissioners. The scope and intendment of the law are that the expense of constructing the drain and the damage for the appropriation of property shall be borne by the petitioners jointly with the owners of the land taken, in proportion to benefits accrued. As we have pointed out, the amendment does not authorize this, and the legislature has only that general power with respect to taxation as would justify its exercise for public purposes. Private property may be constitutionally taken for public use by taxation, as it may by right of eminent domain, and the compensation which must be specially made in the latter case, when property is taken, is deemed to be received, when property is taken under the power of taxation, in the protection afforded by government to the life, liberty, and property of persons; or in the increase of the value of their possessions by the application of their moneys to the public purpose: *People v. Mayor*, 4 N. Y. 419, 55 Am. Dec. 266. In taxation, or in taking private property for public uses, the individual is presumed to receive, or in fact does receive, some equivalent for his contribution. The legislature is, doubtless, the final judge as to what the public necessity and the general good require to be done, as to the extent of taxation therefor and as to its apportionment, and it constitutes no objection to the exercise of the power of taxation that the burden thereof should be laid upon the territorial district, which is exclusively affected by the legislative scheme: ¹⁴⁷ *Darlington v. Mayor*, 31 N. Y. 164, 88 Am. Dec. 248. That taxation can be authorized for a purpose not public is a contradiction in terms, and it would be an illegal assumption of power. Property is taken by assessment, which is a form of taxation, as much as if it were taken by right of eminent domain, and the warrant for it must be found in some public purpose. "The right of eminent domain, or inherent sovereign power, gives the legislature control of private property for public uses, and only for such uses": Per Grover, J., in *Brevoort v. Grace*, 53 N. Y. 245. The plan

of the act of 1895 to permit the assessment of the owners of the lands taken for the construction of a drain was, in my opinion, plainly void under the state and the federal constitutions, as involving the power to levy a tax for the private purpose of a land owner. If the legislature can enforce the construction of a drain at the instance of one person, at the joint cost of himself and of the objecting land owners, the salutary checks imposed upon legislative power for the protection of the citizen become valueless. I quite agree, also, with the views expressed at the appellate division, with respect to the power of taxation conferred by the act. To quote from the language of the opinion: "Under its provisions the authority to tax may be exercised in favor of a single person for the improvement of a single acre of agricultural land, a result which we feel certain was not within the contemplation of the framers of the constitutional provision." As this act confers the right to take property in derogation of private rights, it is to be strictly construed: *People v. Jefferson County Court*, 56 Barb. 136. It has but one object, and that is to enforce the construction of the work needed to drain, or to protect, agricultural lands at the joint cost of the petitioner, or petitioners, and of the owners of the lands taken for the purpose. All of its provisions are connected as parts of a single scheme, which, in any view, must fail for the reasons given.

Nor was there any waiver on the part of the respondents of their right to object. They opposed the application of the commissioners to the county court for the order directing the ¹⁴⁸ entry of judgments against them for the amount of the assessment attempted to be levied upon them. It does not appear that they had consented to any procedure, or that they had estopped themselves by their conduct from opposing the attempt to assess them for the cost and expense of the work.

Upon either of the grounds that I have discussed, the conclusion must be reached that the order and judgment appealed from should be affirmed, with costs.

PARKER, C. J. While I agree with Judge Gray that the statute under consideration is violative of the state constitution, and therefore concur with him in the result, I am at the same time confident that it was the design of the recent amendment to section 7 of article 1 of the constitution to authorize legislation providing a workable scheme by which to secure the drainage of tracts of land, whether large or small,

in order to provide for their proper utilization, thus establishing it to be a part of the fundamental law of the state that such drainage constitutes a public use, and that such section is not in conflict with the federal constitution.

Gray, J., reads for affirmance of order and judgment, with costs.

Parker, C. J., and Haight, J., concur in memorandum.

O'Brien, Landon, and Werner, JJ., concur on second ground stated in opinion.

Cullen, J., not sitting.

EMINENT DOMAIN—PRIVATE USES.—The right of eminent domain does not imply a right in the sovereign power to take the property of one person and transfer it to another even for full compensation, when the public use is in no way promoted by such transfer: *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, 57 N. W. 559; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003.

EMINENT DOMAIN—DRAINAGE.—The legislature may authorize the condemnation of property for the drainage of large areas of swamp land, to promote the public health; but it has been denied that the power of eminent domain can be exercised to drain land in order to make it more productive, on the ground that the use is merely for those who own the land, and therefore is private: See the monographic note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 705.

COLLISTER v. FASSITT.

[163 N. Y. 281, 57 N. E. 490.]

PRECATORY TRUSTS.—A will by which a testator directed his wife, whom he nominated as executrix and made residuary devisee, to use so much of his residuary estate for the support and benefit of his niece as the wife should, from time to time, think best in her discretion to do, and also created a trust fund, the income of which was to be paid to his wife during life, and at her death one thousand dollars per annum of the income were to be paid to such niece until she married, or if she never married, then during her life, creates a trust in favor of the niece during the life of the wife, which a court of equity will enforce against the latter by requiring her to honestly and intelligently exercise the discretion vested in her.

PRECATORY TRUSTS—POWER OF COURT TO CONTROL.—Where by a will a wife is required to pay a niece of the testator out of the residuary estate bequeathed the former so much as she shall, from time to time, think best for the support and benefit of the niece, a court may ascertain the amount and decree the payment of a reasonable sum for the support of such niece, where the wife fails to honestly and fairly exercise her discretion.

Action to construe and enforce the will of Gerard B. Scranton. The paragraphs in controversy were the fourth, fifth, sixth, and eighth, as follows: "Fourth. I direct my wife, Amelia A. Scranton, out of the property hereinafter given and bequeathed to her by this will, to use so much thereof for the support and benefit of my niece, Georgie S. Collister, as my said wife shall from time to time in her discretion think best so to do. Fifth. I give and bequeath to my executor and executrix hereinbefore named the sum of twenty thousand dollars (\$20,000), upon trust, to invest the same and to pay the net income thereof annually to my wife, Amelia A. Scranton, during her lifetime; but on and after the death of my wife, Amelia A. Scranton, I direct my surviving executor to pay out of the net annual income of said twenty thousand dollars (\$20,000) as so invested to my niece, Georgie S. Collister, if she shall then be unmarried, the annual sum of one thousand dollars (\$1,000), in equal quarter installments of two hundred and fifty dollars (\$250), until the marriage of my said niece, Georgie S. Collister; and if my niece, Georgie S. Collister, shall never marry, for or during her natural life; but if my said niece, Georgie S. Collister, shall, at the time of the death of my wife, Amelia A. Scranton, be married, then I direct that my said niece, Georgie S. Collister, shall take nothing under this bequest. Sixth. I give and bequeath to my executor and executrix hereinbefore named the sum of fifty thousand dollars (\$50,000), upon trust, to invest the same and to pay the income thereof to my wife, Amelia A. Scranton, annually, until my daughter, Amelia E. Scranton, shall arrive at the age of twenty-eight (28), and then I direct that my executor and executrix transfer to my said daughter, Amelia E. Scranton, the securities representing said fifty thousand dollars (\$50,000) so invested. . . . Eighth. I give, devise, and bequeath all the rest, residue, and remainder of the estate, both real and personal, of which I shall be seised or possessed or to which I shall be entitled at the time of my death, to my wife, Amelia A. Scranton, absolutely." A judgment entered in favor of the plaintiff was affirmed on appeal to the appellate division. Thence an appeal was taken to the court of appeals.

John R. Dos Passos and Edmund F. Harding, for the appellant.

Hamilton Wallis, for the respondent.

283 BARTLETT, J. This appeal presents the question whether subdivision "fourth" of the testator's will creates a

trust for the benefit of the plaintiff or a charge upon the residuary estate in her favor, which can be enforced in a court of equity.

²⁸⁴ The courts below have rendered judgment for the plaintiff, and this appeal is from a unanimous decision of the appellate division.

In order to properly construe the various provisions of the will and to ascertain the intention of the testator, it is necessary to consider the surrounding circumstances that culminated in the testamentary act.

The plaintiff was the niece of the testator—a child of his deceased sister; he took her into his family when six years old, and she was about seventeen years of age when he died in December, 1888; he bestowed upon her the same care, maintenance, and education as he gave his daughter, who was a few months older than plaintiff, and she accompanied him and his wife and daughter on several trips to Europe, traveling and sojourning with them there for nearly five years.

In September, 1888, about three months before his death, the testator executed his will, wherein he provided for the plaintiff, his daughter, and his wife, who is the defendant in this action, she having contracted a second marriage with one Fassitt.

The scheme of the testator is clear and consistent with the situation which confronted him; he made his wife the executrix of his will in addition to an executor named; he created a trust fund for the benefit of his mother during life; he directed his wife, out of the property "hereinafter given and bequeathed to her," which was the residuary estate, to use so much thereof for the support and benefit of the plaintiff as she should from time to time in her discretion think best so to do; he created a trust fund of \$20,000, the income of which was to be paid to his wife for life, and at her death \$1,000 of the income was to be paid to plaintiff until her marriage, and, if she never married, then during her life; he created a trust fund of \$50,000, the income of which was to be paid to his wife until his daughter attained the age of twenty-eight years, when the trust terminated and the principal vested in the daughter; he gave the residue of his estate to his wife.

The testator's personal estate at the time of his death ²⁸⁵ amounted to about \$193,000. It will thus be seen that, so far as plaintiff was concerned, the testator made complete provision for her future support; he confided it to the discretion of his

wife as to amount during her life, and at her death the plaintiff was to receive \$1,000 a year until her marriage, and, if she did not marry, for life.

If the intention of this testator is to control, as it surely must, it cannot be assumed that he meant to leave this child of seventeen, of his own blood, the object of his solicitude for years, to face the world and earn her own living, if it was so ordered by the mere caprice or ill-will of his widow.

The fourth subdivision of the will, providing for plaintiff's support, and the eighth, devising and bequeathing the residuary estate to the wife, must be read together. The fourth subdivision reads: "I direct my wife . . . out of the property hereinafter given and bequeathed to her by this will to use so much thereof for the support and benefit of my niece, Georgie S. Collister, as my said wife shall, from time to time, in her discretion think best so to do."

The eighth subdivision devises and bequeaths to the wife the rest, residue, and remainder of the estate. This is the only devise and bequest to the wife, so there is no uncertainty when we read in the fourth subdivision the direction that "out of the property hereinafter given" to her she was "to use so much thereof for the support and benefit" of the niece "from time to time," as she should in her discretion think best.

This positive direction of the testator points out the fund and creates a charge thereon; the amount for support and benefit is to be taken out "from time to time"; the sum necessary is alone left to the discretion of the wife, as it might very well vary according to existing circumstances in the years to come.

It is, however, vigorously argued orally, and in the briefs on behalf of the appellant, that the words of the fourth subdivision of the will are merely precatory and do not cut down or qualify the words of absolute devise and bequest in the residuary clause.

²⁸⁶ It is also insisted by counsel that to sustain the validity of the clause in question is to overrule a number of cases in this court.

It is a trite saying that no will has a brother, and it may also be said that the citation of numerous authorities, in most instances, are of little assistance to the court, as each will must be construed in the light of peculiar surrounding circumstances, the scheme disclosed, the language employed, and the intention of the testator gathered from the general situation. In the case before us the intention of the testator to provide for the con-

tinuous support of his niece from his decease until she married or died is absolutely clear.

The cases cited in this court do not stand in the way of carrying out this intention of the testator. In none of them is there a state of facts similar to that here presented.

In *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572, the will read: "I give and bequeath all my property, real and personal, to my beloved wife, Mary, only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good." It is very clear that these are precatory words. The testator gives everything to his wife absolutely, with a mere suggestion as to the disposition she shall make of the property at the close of her life. The wife, vested with absolute title and living many years, the estate at her death might be necessarily expended, or improvidently wasted. The testator's words evidently created no trust or charge.

In *Clarke v. Leupp*, 88 N. Y. 228, the testator gave all his property to his wife, closing with the words, "and do appoint my wife my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named." It was held the widow took an absolute title, and that the succeeding words did not limit the gift. In the case cited we have an absolute gift, followed by words that were held not to disclose the clear intention to cut it down: *Banzer v. Banzer*, 156 N. Y. 287 429, 51 N. E. 291. In the case at bar the situation is reversed and the words creating the trust, or charge, stand first in the will, and the absolute gift is subject to the same; when construed together, they are perfectly consistent.

The case of *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144, is cited by appellant as controlling on this appeal. The grandfather of the defendant, after devising and bequeathing his residuary estate to her, added these words: "I commit my granddaughter [the plaintiff] to the charge and guardianship of my daughter [the defendant]. I enjoin upon her to make such provision for said grandchild out of my residuary estate in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." In holding that no trust or charge was created under the facts disclosed, Judge Rapallo said: "If the

clause had been that the testator enjoined upon the defendant to make suitable provision, out of the residuary estate, for the support of the plaintiff, there would be force in the argument, not indeed that the defendant took the residuary estate in trust, but that she took it subject to a charge, the amount of which might be ascertained by a court of equity, and satisfaction thereof decreed. But such is not the language of the will There was nothing in the will which required her to provide for the support of the grandchild during her minority. She was living with her father, out of the state. No obligation was imposed upon the defendant by her father's will to indemnify the father of the plaintiff for her support, or to furnish him with means therefor. The provision in the will was not intended for the benefit of the father of the plaintiff, nor to relieve him from his legal obligation to support his own child. All these matters were left wholly to the discretion of the defendant, uncontrolled by any consideration except, to use the language of the testator, what 'her own sense of justice and Christian duty shall dictate.' "

Every word quoted from the opinion of the learned judge ²⁸⁸ distinguishes the case in which he was writing from the one at bar, and the case he put by way of illustration as creating a charge which a court of equity would enforce is, in substance, the case before us.

In *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439, the testator, after vesting the absolute title of his property in his wife, provided that if any part of it should remain unexpended at her death, he gave it to his son, his heirs and assigns. Following this was the expression of testator's expectation and desire that his wife should not dispose of any of the estate by will so that it would go out of his "own family and blood relations." It was held that the words of expectation and desire did not qualify the wife's absolute estate; also, that if the words could be construed as a power in trust for the son it was fully executed. This case has no application to the one before us, and does not announce any principle in hostility to affirming the judgment at bar.

In *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274, we have a case where an absolute estate in the wife is followed by the following words: "And it is my desire and request that my said wife do sustain, provide for and educate the daughter of my said adopted daughter. . . . And it is my further desire and request that my wife do make the said and my nephews

and nieces, the children of my brothers, . . . joint heirs after her death in the said estate which by this will I have bequeathed to my said wife." This clause was held precatory, and the estate absolute in the wife. This conclusion was reached because the words construed followed the absolute devise and bequest, and for the further reason that the facts surrounding the making of the will warranted the conclusion. The case has no fact in common with the one before us, and illustrates how dangerous it is to follow supposed precedents in construing wills which have their origin in the varying experiences of human life.

We have already pointed out what seems to us the intention of the testator, which was to charge the support of his niece ²⁸⁹ upon the residuary estate subsequently vested in his wife. This intention is, therefore, the controlling factor in the case, and there is no authority holding to the contrary.

In *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411, after a gift of all his estate to his wife, the testator inserted this provision: "If she find it always convenient . . . to give my brother . . . during his life the interest on \$10,000 (or \$700 per annum), I wish it to be done." It was proved that during the years the widow refused to make these payments it was entirely convenient for her to have paid the allowance. It was held that the provision contemplated, not the widow's choice or preference, but her pecuniary condition each year; that the intent of the testator was to charge the annuities upon the gift to his wife if convenient for her to pay them.

Judge Finch, in delivering the opinion of the court, said: "The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended. In such a case we must look at the whole will, so far as it bears upon the inquiry, and the use of the words 'I wish' or 'I desire' is by no means conclusive. They serve to raise the question, but not necessarily to decide it. We are convinced that in the present case the testator meant to charge upon the gift to the wife the annuities to his sister and brother, provided, only, that their payment should not occasion her inconvenience."

In *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, the supreme court of the United States held, in a case where there was an absolute gift of the estate to the wife, followed by the words, "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provi-

sion for them as in her judgment will be best," that the mother and sister took under the will a beneficial interest in the estate given to the wife to the extent of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund. Also, that it was the ²⁹⁰ duty of the court to ascertain what provision would be suitable and best under the circumstances and all particulars and details for securing and paying it.

Mr. Justice Matthews said: "If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat, it to call it 'precatory.' The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not take away, the discretion of the legatee, growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary."

It thus appears that the fact, in the case at bar, that the testator left the amount to be used for the support of his niece to the discretion of his wife offers no obstacle to a court of equity. This discretion must be honestly and intelligently exercised, and, if it is not, a court of equity will compel it.

In *Costabadie v. Costabadie*, 6 Hare, 410, the court said: "If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gives or intended that he should have, that is, as much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy. But, consistently with the plaintiff having an interest subject to the mother's discretion, she has ²⁹¹ a right to discovery of

the property in respect of which the interest exists, and also a right to a discovery of all the acts which have been done, and the reasons for doing them which the defendant may be able to give. She has that right in order that the court may be able to see whether the discretion which has been exercised by the party intrusted with it is within the limits of a sound and honest execution of the trust. . . . If a bill be filed, the court will, of course, inquire into the acts which may have been done in the administration of the trust, and may possibly (as has been done in many cases) require the trustee to exercise the discretion under the view of the court."

In *Lawrence v. Cooke*, 104 N. Y. 638, 11 N. E. 144, Judge Rapallo said, in language already quoted, that if the wife took the estate subject to a charge, the amount "might be ascertained by a court of equity and satisfaction thereof decreed."

In the case at bar the discretion of the defendant was not properly or honestly exercised. The defendant contributed to the support of plaintiff in 1888, \$25; 1889, \$188.50; 1890, \$150; 1891, \$65.50; 1892, \$119.70; 1893, \$207.14, and 1894, \$25. Since the year 1894 the defendant has made no provision for plaintiff's support, so far as this record discloses the facts.

The plaintiff, while living with her grandmother, testator's mother, paid nothing for her board and lodging, but maintained herself by giving music lessons and on such sums as were contributed by defendant, as before stated.

Plaintiff lived with her grandmother until the death of the latter, about September, 1894, and received under her will the whole of her estate, amounting to about \$2,000. It is found that soon after this the plaintiff, for the purpose of earning a livelihood, entered the Presbyterian Hospital in the city of New York to fit herself for the position of a trained nurse, expecting to graduate in May, 1898; that while in the hospital she received her board and lodging and a salary of \$9 per month, and after graduation she will earn \$22 a week when able to secure employment; that she is dependent ²⁹² on her earnings and the income of \$1,500 remaining of her grandmother's estate.

In view of this situation the supreme court has adjudged that for the six years from December 8, 1888, the date of testator's death, the plaintiff is entitled to \$500 a year, payable quarterly, and since that time to \$1,000 a year, payable in like manner.

We are of opinion that the defendant took the residuary estate of the testator charged with the payment of a reasonable amount for the support of the plaintiff, in accordance with the terms of the will, and as she failed to honestly and fairly exercise the discretion vested in her, it was competent for a court of equity to ascertain the amount and decree its payment.

In closing, it may be proper to notice two additional points raised by appellant's counsel.

It is insisted that the plaintiff, having left the home of testator three months before his death, discarded his surname and assumed her own of Collister, had changed her relations with the family and to some extent caused the testator to treat her differently than he might otherwise have done.

The referee finds that the plaintiff resided with her grandmother from "about September 7, 1888." The testator's will is dated September 11, 1888, and refers to his niece as Georgie S. Collister. It is evident that the will was not made after the plaintiff had been long separated from testator, and it is quite possible she was a member of his household when it was executed.

The other point is raised by an offer made by defendant to the plaintiff at the trial in the form of a letter which was offered in evidence and excluded, defendant excepting. The letter is dated November 18, 1896, and is as follows: "I have concluded to exercise the discretion vested in me under the will of my late husband, Gerard B. Scranton, deceased, dated the eleventh day of September, 1888, and to allow you the sum of \$400 a year for your support and benefit, the same to accrue to you from November 1, 1895."

²⁹³ This offer was properly rejected for several reasons; it did not deal with nearly eight years prior to November 1, 1895, during which time defendant had failed to fairly contribute to plaintiff's support; it was not on its face an honest and fair exercise of the discretion vested in defendant; it was inconsistent with the answer which repudiated all right in the plaintiff: *Clark v. Post*, 113 N. Y. 17, 20 N. E. 573; it did not purport to be an offer of judgment under the Code of Civil Procedure.

We do not deem it necessary to discuss the other points of counsel, which have, however, received due consideration.

The judgment appealed from should be affirmed, with costs.

JUDGE O'BRIEN DISSENTED. He claimed that while the judgment in question was supposed to reflect the will and intention of the testator such judgment had no foundation whatever in the will upon which it was based; that independent of the question whether the words were sufficient to create a trust or a charge upon property of any kind, the amount to be contributed, if any, was left entirely in the discretion of the defendant; that for the courts to determine how this discretion should be exercised is a perversion of the will, since it substitutes the discretion and judgment of the court for the discretion of the widow; that the will contains simply an expression of a desire, request, or expectation, but created no trust in favor of the plaintiff or any charge upon the estate devised or bequeathed to the defendant. In support of this view, he cited *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Clark v. Leupp*, 88 N. Y. 228; *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144; *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274.

PRECATORY TRUSTS are discussed in the monographic notes to *Harrison v. Harrison*, 44 Am. Dec. 372-379; *Knox v. Knox*, 48 Am. Rep. 494-499. In determining whether a precatory trust is raised by a will, the essential point is, whether it should be inferred that the testator intended to impose an obligation on his devisees or legatees to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to them to carry out such wishes at their discretion: *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. See, further, *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277; *Boyle v. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. 494.

CASSIDY v. UHLMANN.

[163 N. Y. 380, 57 N. E. 620.]

EVIDENCE OF BELIEF OF AN ACCUSED DEFENDANT. Where the character of an act depends on the intent with which the act is done, or, in other words, upon the operation of the doer's mind, his belief touching certain conditions which should influence him is material, and may be testified to by him.

EVIDENCE—BELIEF OF BANK DIRECTOR RESPECTING ITS SOLVENCY.—A director of a bank against whom an action is brought to recover for deposits made, on the ground that they were received when it was, to his knowledge, hopelessly insolvent, should be permitted to testify respecting his belief in regard to its assets at the time the deposits were received. Error in excluding such testimony is not rendered harmless by the presenting of abundant evidence from which the jury could have found that his actual knowledge was such that he could not have entertained any such belief.

Action against the defendant to recover for deposits in a bank. A verdict was returned and judgment entered in favor of the plaintiff in the trial court, and a motion made for a new trial was denied. The action of the trial court was affirmed by

the appellate division of the supreme court; thence an appeal was taken to the court of appeals.

William A. Jenner and Oscar W. Jeffery, for the appellant.

Harold Nathan, for the respondent.

³⁸¹ PARKER, C. J. Plaintiff's assignors were depositors of the Madison Square Bank, which was closed on the ninth day of August, 1893, by the bank examiner. They made the deposits involved in this action on the seventh and eighth days of August, at which time the bank was hopelessly insolvent, and this action is brought to recover the amount of such deposits from the president and two of the directors of the bank, one of whom was the defendant Uhlmann. The complaint was framed and the action tried upon the theory that this defendant was guilty of a fraud by which the plaintiff's assignors were damaged, in that, with actual knowledge of the bank's insolvent condition, he, together with the president and another director by the name of McDonald, was instrumental in keeping the bank open and receiving deposits of all who came to it, including plaintiff's assignors. The claim was not that there was direct, open misrepresentation by the defendant, but rather that his fraud consisted in a suppression of the truth as to the insolvent condition of the bank, and at the same time participation in the direction, which kept the bank open for the receipt of deposits after he was possessed with full knowledge of its insolvency. His liability, therefore, was predicated solely upon fraud, and the plaintiff attempted to show the entire history of the financial condition of the bank from immediately previous to the seventh day of August, 1893, down to and including the time when it came into the possession of the bank examiner; and he claimed that the facts proved required a finding by the jury that the defendant Uhlmann had knowledge of the real condition of the bank on the 7th and 8th of August. The contention of the defendant was that the result of an examination made by him ³⁸² showed that the bank had more than sufficient property to pay its depositors in full, and he marshaled such facts and circumstances as he could to support his contention that he was acting in good faith and without knowledge of the insolvency of the bank. This was one of the issues, indeed the leading one, and the defendant sought to put before the jury his belief touching the responsibility of the bank up to Tuesday night, August 8th, his claim being that his belief

constituted an important element which the jury should weigh. The following question was asked:

"Q. Now, Mr. Uhlmann, what was your belief up to Tuesday night with regard to the surplus that the bank had for the purpose of paying its liabilities?

"Same objection. Objection sustained. Defendant excepts.

"Q. From whom did you receive information with regard to the condition of the bank up to Tuesday night? A. From Mr. Blaut, the president; Mr. Thompson, the cashier; from Mr. McDonald, a director; from inquiry in the books of the commercial agency, and from inquiry at banking houses as to the value of securities.

"Q. Now, as a result of that information, what was your belief as to the financial condition of the bank up to Tuesday evening?"

"Objected to; objection sustained and exception."

Evidence was also given on the part of the defendant tending to show that the defendant advised that deposits on the 7th and 8th of August should not be mingled with the funds of the bank, owing to some suspicious circumstances that made an investigation of the bank's affairs necessary, but that the moneys of depositors should be kept by themselves until an investigation should disclose the real condition of the bank. It seems to be pretty conclusively established that such a conversation took place, and that for some part of Monday, the 7th, that course was taken with the moneys received from depositors; some time after noon of that day, however, the president, having had a talk with the head of the force of bank examiners, said that he proposed to telephone to the ³⁸³ cashier to take the deposits according to the usual course of business, and to that course this defendant testifies he protested in vigorous language. That course was adopted, however, but under such circumstances as leads plaintiff to insist that such deposits were thereafter taken with knowledge on the part of this defendant that deposits were being received. Still the defendant insisted under oath that he did not know it, and the court was asked to permit him to declare on oath his belief on that subject for the consideration of the jury.

"Q. What was your belief as to the taking of deposits on Monday up to the meeting of the bank Monday evening?

"Objected to as incompetent, immaterial, and irrelevant, and calling for the mental operation of the witness. Objection sustained. Defendant excepts.

"Q. Did you believe on Monday, up to your visit to the bank Monday evening, that the instruction which Mr. Putney or Mr. McDonald had given on Saturday evening with respect to taking deposits was being carried out?

"Same objection. Same ruling. Defendant excepts.

"Q. Did you have any belief that deposits were being taken on Monday up to Monday evening?

"Same objection. Same ruling. Defendant excepts."

It is, of course, the general rule that the operation of the mind of a witness may not be given, but there are exceptions to the rule and among them is a case where the character of the act depends on the intent with which the act is done, or, in other words, upon the operation of the doer's mind, and in such case his belief touching certain conditions which should influence him is material. A party's testimony as to his belief may have much or little value with the jury, but he is always entitled to have it considered where, as in this case, his liability is predicated upon the claim that with knowledge of the truth he suppressed it under circumstances calling upon him to speak, with the result of injury to another. If it were a fact that, after having made such an investigation of the affairs of the bank as a reasonable and prudent man would make under the circumstances with which he was surrounded, ³⁸⁴ he believed as a result thereof that the bank was solvent, then the action should not have gone against him for he acted justly and properly according to his belief and, therefore, not fraudulently. But the plaintiff says that there was abundant evidence from which the jury could find that his knowledge was such that he could not, and did not, entertain any such belief. That may well be so, but the fact remains that his belief was a fact of the first importance in the case, and he was entitled to testify as to what it was, not because his testimony would be controlling, for it would not, but because he was entitled to have it weighed by the jury with the other testimony in determining what the fact was.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Bartlett, Martin, Cullen, and Werner, JJ., concur.

Gray and Vann, JJ., dissent.

EVIDENCE OF BELIEF OR INTENT.—Whenever the motive, intention, or belief of any person is a material fact to be proved,

it is competent to prove it by the direct testimony of such person, whether he is a party to the suit or not: See the monographic note to *Gardom v. Woodward*, 21 Am. St. Rep. 314-319, on the right of a party to testify to his belief, motive, or intent.

EATON v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[163 N. Y. 391, 57 N. E. 609.]

RAILWAYS—DUTY OF RESPECTING CARS RECEIVED FROM OTHER CORPORATIONS.—It is the duty of a master to furnish his servants with safe and suitable appliances, so far as reasonable care will accomplish this result, and this duty applies to cars received from other companies as well as defendant's own. A railroad company is bound to inspect the cars of another company used upon its road just as it would inspect its own.

RAILWAY CORPORATIONS—FELLOW-SERVANTS OF, WHO ARE NOT.—Inspectors of cars are not fellow-servants with brakemen, so as to relieve the corporation from liability to the latter for injuries caused by the negligence of the former. The duty of the master cannot be delegated so as to relieve him from this responsibility.

RAILWAYS—CONSTRUCTION OF RULE REQUIRING BRAKEMEN TO INSPECT CARS.—A rule requiring that at all stoppings of trains the brakemen or trainmen must inspect the wheels, brakes, and trucks of the car, and report any defects immediately to the conductor, does not exact of them the special skill required of car inspectors, nor does it make the brakemen and inspectors thereof fellow-servants, nor preclude the recovery from the employer by the former for injuries received through the negligence of the latter.

RAILWAYS—CONTRIBUTORY NEGLIGENCE OF BRAKEMAN.—The failure of a brakeman to discover defects which would constitute negligence in a car inspector does not necessarily establish contributory negligence on the part of the brakeman, though one of the rules of the employing corporation declares it to be the duty of all brakemen to inspect the wheels, brakes, and trucks of the car at all stopping places and report immediately to the conductor.

William S. Jenney, for the appellant.

Edward Harris, for the respondent.

393 CULLEN, J. This action was brought, servant against master, to recover damages for personal injuries. The plaintiff was an experienced brakeman in the defendant's employ, and at the time of the accident was in service on a freight train. While applying the brake, the attachment of the brake-chain to the foot of the brake-staff gave way, and the plaintiff was

precipitated from the top of the car upon the track, where his legs were run over by the rear car of the train. The car on which the plaintiff attempted to set the brake was that of another company, which had been received for transportation at Buffalo. On an examination after the accident it appeared that the eyebolt, by which the chain had been attached to the foot of the brake-staff, was broken. Evidence was given to the effect that the shank or pin of the eyebolt had been worn to such an extent that it was only half its original thickness; that this rendered the bolt liable to break, not only on account of the loss of metal, but because of the play which was given the pin in the hole in the brake-shaft in which it was set. There was also evidence given from which the jury might have found that a reasonable inspection of the pin and brake-shaft at this point would have disclosed the weakness of the parts. The car was inspected at Buffalo by the defendant's inspectors, but the condition of the eyebolt was not noticed. The jury rendered a verdict for the plaintiff, upon which, a motion for a new trial having been denied, a judgment was subsequently entered. On appeal, the judgment and order were reversed by the appellate division, but, as stated in the order of that court, "upon questions of law only, the court having examined the facts and found no error therein."

The learned appellate division, in its discussion of the case, assumed that the question whether the defect in the eyebolt was discoverable or not by reasonable inspection was one of fact for the jury. This assumption, in our opinion, was warranted by the evidence, the details of which it would not be ³⁹⁴ profitable to recite. That it is the duty of the master to furnish his servants with safe and suitable appliances, so far as reasonable care will accomplish that result, may be now considered as an elementary rule of law, and this duty applies to cars received from other companies as well as to its own. "A railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars. It owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it from another road which have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them": *Goodrich v. New York etc. R. R. Co.*, 116 N. Y. 398, 15 Am. St. Rep. 410, 22 N. E. 397; see *Gottlieb v. New York etc. R. R. Co.*, 100 N. Y. 462, 3 N. E. 344; *Baltimore etc. R. R. Co.*

v. Mackey, 157 U. S. 72, 15 Sup. Ct. Rep. 491. This doctrine was accepted by the learned court below, but it held that the defendant was exempted from liability because of the following rule prescribing the duty of its employés, to which plaintiff was deemed to have assented: "Rule 153. At all stoppings of trains the brakemen or trainmen must inspect the wheels, brakes, and trucks of the car and report any defects immediately to the conductor." The court reasoned that, under this rule, the duty of an inspection was devolved upon the trainmen equally with the car inspectors at Buffalo; that the inspectors were fellow-servants of the trainmen in the duty of inspection; that the negligence of the former in the discharge of their duty was negligence of fellow-servants, and that if it was negligence on the part of the inspectors not to have discovered the defective character of the brake, similar omission on the part of the plaintiff or the trainmen constituted contributory negligence on the plaintiff's part.

There can be no question that, apart from the rule quoted, inspectors are not fellow-servants of the trainmen so as to relieve a railroad company from liability to the latter for injuries occasioned by the negligence of the former. The duty which the master, as such, owes to his employés, of exercising ³⁹⁵ reasonable care that the appliances furnished them should be safe and suitable cannot be delegated so as to relieve the master from responsibility, and, so far as it is performed by others, the negligence of any servant, agent, or employé in the work is deemed not the negligence of a fellow-servant, but that of the master himself: *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Bailey v. Rome etc. R. R. Co.*, 139 N. Y. 302, 34 N. E. 918. In the last case it is said: "The master is never exonerated by the negligent omission of subordinates to perform duties which are imposed upon him in his character as master, resulting in injury to other employés." Inspection to discover whether an appliance is defective is as much a part of the work of furnishing safe appliances as reparation after the defect is discovered, and in the *Bailey* case the negligence alleged was failure to inspect.

We may concede that the question whether a faulty act or omission complained of is negligence in the discharge of the duty of the master, as such, or is in a detail of the work, may depend on the manner in which the work is carried on. We may also assume, for the argument, that it was within the power of the defendant to have so conducted its business as to

have made its trainmen both brakemen and car inspectors; but the question remains whether it did so in this case, and whether such is the effect and object of the rule promulgated. The question is not without interest to the defendant in other cases than that before us. If the same servant is to discharge the duties of separate positions he must have the necessary qualification for each, to be a competent fellow-servant. If a brakeman is to act as car inspector he must have the expert skill and knowledge which a jury might find was necessary to discharge the duties of the latter position, and the defendant might find itself very much circumscribed in its appointment of trainmen. We think it quite plain that the defendant never intended to blend, nor has blended, the two distinct positions of brakeman and inspector. It appears that, as a matter of fact, it has assumed to inspect cars at its terminus by servants especially designated for that purpose. The rule promulgated ³⁹⁶ by the company must have a reasonable construction. It imposed on the trainmen the obligation of examination of the appliances which their service compelled them to use, both for their own protection and the protection of the property of the master and the persons of their fellow-servants. The examination, however, was not necessarily to be that of an expert inspector, but such as the ordinary knowledge of brakemen and the time allowed for the purpose consistent with their other duties, would enable them to make. We concur in what is said by Justice Hatch in *Myers v. Erie R. R. Co.*, 44 App. Div. 11, 60 N. Y. Supp. 422: "It is quite evident that the measure of obligation which is imposed upon an employé of this character by virtue of this rule is much less strict than is imposed upon employés of the defendant charged with the specific duty of inspecting cars for the express purpose of discovering their condition, and the reason for such distinction is obvious. A brakeman has other duties and obligations resting upon him than that of inspection, and in many cases such duties almost wholly exclude any opportunity to examine the various appliances which he is required to use. Under such circumstances, the rule, interpreted in the strict sense, would impose an obligation which the employé would have little or no opportunity to discharge. It must, therefore, be subject to a reasonable interpretation, measured in degree by the opportunity to examine and the character of the existing defect." Under this view, by reason of the difference between the duty of inspection resting on the trainmen, and that imposed on the car inspectors,

the two classes are not fellow-servants within the rule which exempts the master from liability. The question of the effect of similar rules arose in *Pratt v. Lake Shore etc. Ry. Co.*, 63 Hun, 616, 18 N. Y. Supp. 682, affirmed without opinion in 136 N. Y. 654, 32 N. E. 1016, and *O'Malley v. New York etc. R. R. Co.*, 67 Hun, 130, 22 N. Y. Supp. 48, affirmed without opinion in 142 N. Y. 665, 37 N. E. 590, in both of which cases recoveries for defective appliances were upheld. These decisions seem conclusive on the question before us, though we have treated it as an original one.

³⁹⁷ From the views already expressed it is apparent that a failure to discover defects which would constitute negligence in a car inspector might not necessarily establish contributory negligence on the plaintiff's part. The question was for the jury. There is this further to be said: Under the rule, the duty of inspecting the brakes on the train did not rest on the plaintiff alone, but on him and the other trainmen. The evidence tends to show that in the necessary division of duties between the several trainmen the inspection of the brake that proved defective did not fall upon the plaintiff. Assuming that there was negligence on the part of his fellow-brakemen, such negligence would not be imputable to the plaintiff or preclude a recovery by him: *Cone v. Delaware etc. R. R. Co.*, 81 N. Y. 206, 37 Am. Rep. 491; *Coppins v. New York etc. R. R. Co.*, 122 N. Y. 557, 19 Am. St. Rep. 523, 25 N. E. 915.

The judgment of the appellate division should be reversed and the judgment entered on the verdict of the jury at trial term should be affirmed, with costs.

Bartlett, Martin, Vann, and Werner, JJ., concur.

Parker, C. J., not voting.

Gray, J., not sitting.

A RAILROAD USING THE CARS OF A CONNECTING LINE is liable to the same extent as if they were its own, if such cars, when received and used, are dangerous to its employes: *Reynolds v. Boston etc. R. R. Co.*, 64 Vt. 66, 33 Am. St. Rep. 908, 24 Atl. 134. If it undertakes to use them without due inspection, it is answerable to its employes for defects ascertainable by reasonably careful inspection: *Moon v. Northern Pac. R. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 194, 48 N. W. 679. See, too, *Pennsylvania R. R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559.

A CAR INSPECTOR REPRESENTS THE RAILROAD company, so far as his duty to inspect machinery, brakes, and cars is concerned, and his negligence is the negligence of the company: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 621.

MERCHANTS' BANK v. WEILL.

[163 N. Y. 486, 57 N. E. 749.]

AN ASSIGNEE OF A MORTGAGE takes it subject to all the defenses which were valid between the original parties. This rule relates only to defenses arising out of the matters inherent in the contract by which the deed in question is evidenced and existing before it is signed. New equities arising or defenses accruing thereafter are not within its application.

ASSIGNMENT OF MORTGAGE—DEFENSES SUBSEQUENTLY ACCRUING.—If, when an assignment of a mortgage is made, there is no defense thereto, the subsequent exercise by the mortgagor of an option conferred by an unrecorded and collateral agreement to rescind the sale of the property, and then be relieved of the obligation growing out of it, cannot create a defense in his favor assertable against the assignee.

Action to foreclose a bond and mortgage and for a judgment of deficiency against the defendant Weill as the obligor upon the bond. The legal title to a tract of land was vested in one Angell for the benefit of the firm of Thorne & Angell, and such land was by Angell conveyed in November, 1890, to the defendant Weill for a consideration of eight thousand three hundred and two dollars. Of this only two thousand three hundred and two dollars were paid, and the balance was secured by the bond of Weill by which he promised to pay Angell six thousand dollars with interest. As collateral security for the payment of the indebtedness secured by the bond, Weill executed a mortgage to Angell on the same premises, and this mortgage and the bond were in January, 1891, by Angell assigned to plaintiff as collateral security, and the assignment duly recorded. At the time of the execution of the bond and mortgage an agreement was entered into between Thorne & Angell and Weill to the effect that if Weill should, within two years, elect to reconvey the premises to Thorne & Angell, they would, upon such reconveyance, pay to Weill all moneys before paid by him, and release him from all obligations incurred with reference to the property. Such agreement was not recorded, nor did the plaintiff have any notice thereof. After the conveyance to it, however, Weill executed a conveyance of the premises to Thorne & Angell, they assuming and agreeing to pay the mortgage, and Weill claimed as a defense that such conveyance had been made by him in pursuance of his right to rescind the original purchase of the property, and that by his reconveyance his bond had been discharged and he necessarily relieved from personal liability. The decision of the trial court was in favor of Weill,

but it was reversed by the appellate division of the supreme court, and he hence prosecuted this appeal.

Simon Fleischmann and Louis E. Desbecker, for the appellant.

George J. Sicard, for the respondent.

490 GRAY, J. The claim of the appellant Weill is, that upon the facts, which are uncontroverted, the bank took an assignment of the bond and mortgage from Thorne & Angell, the mortgagees, subject to all the equities attending the original transaction, and that it must abide by the case of its assignors, who could not alienate anything but the beneficial interest which they possessed, and who were bound by the private collateral agreement. The doctrine which he invokes is that early asserted in *Bush v. Lathrop*, 22 N. Y. 535, and which the cases since then have reiterated: *Trustees etc. v. Wheeler*, 61 N. Y. 112; *Green v. Warnick*, 64 N. Y. 220; *Bennett v. Bates*, 94 N. Y. 354; *Hill v. Hoole*, 116 N. Y. 299, 22 N. E. 547. They hold that the assignee of a mortgage takes it subject to all the defenses which were valid between the original parties, and this principle was borrowed from Lord Thurlow's rule in *Davies v. Austen*, 1 Ves. Jr. 247. Within its legitimate application, its correctness has not been disputed in this court; but, because of the broadness of its intended application in *Bush v. Lathrop*, 22 N. Y. 535, it was soon found necessary to place limitations upon the authority of that case in the decisions in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, and in *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173. They ⁴⁹¹ overruled *Bush v. Lathrop*, 22 N. Y. 535, in the application of the principle to its own state of facts and held that a bona fide purchaser for value of a non-negotiable chose in action from one upon whom the owner has, by assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner. The decision in the latter case was based upon the doctrine of estoppel, which will preclude the real owner from asserting his title against a bona fide purchaser from one upon whom he has conferred apparent ownership and apparent absolute authority to convey: *Green v. Warnick*, 64 N. Y. 220. The doctrine of *Bush v. Lathrop*, 22 N. Y. 535, was so broad as to be inequitable in applying a principle otherwise correct and undisputed to cases such as those of shares

of corporations, or other personal property, where the legal title being capable of transfer by assignment, the true owner has apparently conferred upon another the full power of disposition.

I do not think that the rule upon which the appellant relies applies to the facts of the present case, and that it relates, as Mr. Justice Follett observed of it, in rendering the opinion which prevailed below, "to defenses arising out of matters inherent in the contract by which the chose in action is evidenced and existing before it is assigned." When this assignment was made, there was no defense to the mortgage. It was a subsisting and valid obligation for the amount expressed as owing by Weill, and his present defense to the enforcement of his liability arises from his exercising an option, conferred by an unrecorded and collateral agreement, to rescind the sale of the property and thus to be relieved from the obligation growing out of it. But this could not be said to have been a defense to the mortgage existing at the time of its assignment; for it was one which was brought into existence by the mortgagor at a time subsequent. Non constat that he would ever exercise his option to rescind under the collateral agreement, and whether he would do so would depend upon events, or considerations, subsequently occurring and influencing its exercise. The cases to which the appellant refers us are not ⁴⁹² parallel in their facts and I find none which is. Generally, with reference to mortgages, they relate to defenses growing out of the original transaction and affecting their legal inception as liens, or as obligations of the mortgagor. I think the rule was intended, and should be held, to apply to those defenses, legal or equitable, which were available to the mortgagor at the time of the assignment of the mortgage and that new equities arising, or defenses accruing, thereafter are not within its application. The ordinary duty incumbent upon the purchaser of a bond and mortgage for his protection is to estop the mortgagor, by his formal declarations as to the amount being justly due and owing, from thereafter questioning his liability; but the bank could never, in reason, have anticipated a defense to an actual obligation, which was dependent for its existence upon the mortgagor's availing himself in the future of an option conferred by a secret agreement made between himself and the mortgagee. Had such an agreement appeared in the bond and mortgage, the assignee, of course, would have taken at its risk, if at all.

When this assignment was made the bond and mortgage were actual obligations, having a valid inception, and if the debtor chose not to give public notice of his private executory agreement by recording, it was certainly incumbent upon him to inform the bank, if he proposed to avail himself of its provisions.

In my opinion, the plaintiff was entitled to enforce the appellant's liability upon his bond, to its full extent, for any deficiency arising upon a sale of the mortgaged premises, inasmuch as it is found that Thorne & Angell's indebtedness was in an amount in excess of the amount due upon the mortgage held as collateral to the indebtedness.

The judgment appealed from should be affirmed, with costs.

Parker, C. J., O'Brien, Haight, Landon, and Werner, JJ., concur.

Martin, J., dissents.

AN ASSIGNEE OF A MORTGAGE takes it subject to any defense that exists between the original parties, but not to equities of third persons of which he has no notice: *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319, 73 N. W. 850. See, too, *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685, 41 Atl. 862. He cannot be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction duly entered of record: *Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am. Dec. 134.

DOUGHERTY v. MILLIKEN.

[163 N. Y. 527, 57 N. E. 757.]

MASTER AND SERVANT—NEGLIGENT USE OF MATERIALS SUPPLIED.—Where, as in placing derricks for a temporary use, an employer exercises reasonable care to furnish safe and proper materials and to employ competent and skillful workmen, he has discharged his whole duty, and is not responsible to an employé for the negligent use of the materials so furnished.

EVIDENCE—BURDEN OF PROOF—NEGLIGENCE.—Where the case is not one which permits the inference of negligence from the happening of an accident, the defendants are entitled to rest on the presumption that they performed their duty as masters until affirmative evidence to the contrary is given.

EVIDENCE—NEGLIGENCE NOT IMPLIED.—The fact that the eyebolt to which two derricks were fastened broke, causing them to fall and inflict injuries on an employé, does not tend to prove negligence on the part of anyone.

EXPERT TESTIMONY IS ADMISSIBLE (1) in those cases in which the conclusions to be drawn by the jury depend upon the existence of facts not of common knowledge, and peculiarly within the knowledge of men whose experience or study enables them to speak with authority on the subject; and (2) in those cases in which the conclusions to be drawn from the facts stated, as well as the knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the reach of ordinary training or intelligence. In cases of the latter class both the facts and the conclusions to which they lead may be testified to by qualified experts.

EXPERT TESTIMONY—IMPROPER ADMISSION OF.—It is not proper to receive expert testimony as to whether a witness regarded an eyebolt as sufficient to sustain two derricks attached thereto, where the sufficiency of the derricks and of each of their parts depends upon certain facts which a witness skilled in their construction could easily have described to the jury, and the jury with these facts before them would have been competent to form a conclusion.

Perry D. Trafford, for the appellants.

Isaac M. Kapper, for the respondent.

529 **WERNER, J.** This action was brought to recover damages for personal injuries resulting from the collapse of a derrick upon which the plaintiff was at work when the accident occurred. The negligence charged against the defendants is, that a certain eyebolt to which said derrick and another derrick were fastened by means of cables or guys was "in an unsafe, insufficient, insecure, dangerous, and improper condition for the purpose for which the defendants used the same, so that solely by reason thereof and while the plaintiff was upon one of the said derricks as aforesaid, the said eyebolt broke, causing said derrick to fall."

Aside from the testimony of the experts, which will be hereafter referred to, the evidence adduced for the plaintiff establishes the following facts: The defendants were engaged in the business of iron and steel construction. The plaintiff had been employed by them as a laborer for about two years prior to the day of the accident. Two or three months before the accident defendants had removed their shops to the foot of Clinton street in the city of Brooklyn. Upon the docks which formed a part of the yards adjacent to defendants' shops there were erected two derricks about sixty or seventy feet apart. The mast of the larger one was about thirty-five or forty feet in height, and that of the smaller one measured about thirty feet. The boom upon each was somewhat shorter than its companion mast. These derricks had been in use at this yard for two or

three weeks. One week before the accident they were put up at the place where they afterward fell. Each of said derricks was supported by four guys which were fastened at different places. The only ⁵³⁰ eyebolt used as an anchor was the one which broke and caused the accident. It was about an inch in diameter and ten or twelve inches long. When the derricks were last erected, prior to the accident, one of the guys running to the smaller one was anchored into this eyebolt, which was screwed perpendicularly into the stringpiece at the end of the dock. Between the time when the derricks were thus erected and the happening of the accident, one of the guys of the larger derrick was also fastened to said eyebolt; but the evidence does not disclose when, or by whom, or under what circumstances, it was done. On the day before the accident, one Avery, another of defendants' employés, who is referred to by plaintiff as his "immediate boss," commenced the work of substituting wire guys for ropes. During that afternoon the plaintiff was engaged in carrying wire and materials for this work. On the morning of the accident plaintiff was directed by Avery to go aloft, and he was hoisted to the top of the larger derrick. While steadying himself in this position and awaiting orders from Avery both derricks collapsed; the plaintiff was precipitated upon the docks and sustained the injuries complained of.

At the time of the accident a "fifteen-inch" iron beam forty or forty-five feet long and weighing about sixteen hundred pounds was being hoisted upon the smaller derrick. Upon investigation as to the cause of the accident, it was discovered that the eyebolt, which had served as an anchor between the two derricks, had broken off "about an inch into the wood." There was no evidence of any inherent defect in the eyebolt except that given by the witness Avery, who testified "that it looked all right, with the exception of one little spot in it. . . . There was a peculiar look in the iron. . . . It did not look just as the other parts of the iron did."

This resumé of the facts clearly discloses the inherent weakness of plaintiff's case which rendered a resort to expert testimony both prudent and necessary. The facts above referred to were obviously insufficient to support the allegations of negligence set forth in the complaint. Before adverting to the exceptions which were taken to the evidence of the experts, let us clearly emphasize the position of the case without ⁵³¹ such evidence. The falling of the derricks, the apparent cause and the resultant injuries to the plaintiff, were clearly

shown, but nothing more. Indeed, the case is so singularly barren of essential facts as to make it almost a matter of conjecture whether the accident happened under circumstances which would in any event render the defendants liable for its consequences. It seems to have been assumed rather than proved that the derricks in question were designed for continuous use in the place where the accident occurred. The case was submitted to the jury, apparently without objection from defendant's counsel, upon the theory that these structures and the character of their use were such as to charge the defendants with the master's primary duty of furnishing to their servants reasonably safe and suitable tools, appliances and machinery. The learned appellate division affirmed the judgment entered upon the verdict on the assumption that these derricks "were intended and erected for permanent use." We have scanned the record for evidence in support of this assumption, but in vain. The facts disclosed by the evidence are quite as consistent with the theory that the fastening of these derricks was a mere detail of some work, the improper performance of which by anyone but the plaintiff would have been the negligence of a coemployé, as with the assumption that the structures were such as to charge the defendants with responsibility, not only for the sufficiency and suitability of their constituent parts, but the safety and adequacy of their construction as a whole. A derrick is one of those appliances which may be used in various ways and for different purposes. In some circumstances it may be a mere temporary means to an end, in the performance of the work which, of necessity, makes the kind and number of its fastenings dependent upon the exigencies of the moment or the situation. In such a case, if the master has exercised reasonable care to furnish sufficient and proper materials and to employ competent and skillful workmen, he has discharged his whole duty, and he is not responsible for the negligent use of the materials which he has furnished. Under other conditions ⁵³² a derrick may be so used as to be a permanent appliance in the regular and ordinary conduct of the master's business, so as to charge him with responsibility not only for the sufficiency of the materials of which it is composed, but for the safety and adequacy of its construction.

In view of the omission of defendants' counsel to raise the question suggested by this distinction, either by a proper exception or request to charge, the foregoing discussion would be more academic than practical were it not for the necessity of

clearly defining the relation of the expert testimony to this case. As the case stood without the expert testimony, there was an utter absence of evidence upon which to predicate a single negligent act of commission or omission against the defendants, either in the employment of unskillful or incompetent coservants of the plaintiff, in the furnishing of unsafe or inadequate materials, or in the ultimate construction of the derricks. As the case is not one which permits the inference of negligence from the mere happening of the accident, the defendants were entitled to rest upon the presumption that they had performed their duty as masters until affirmative evidence to the contrary had been given. This rule is now so well established that it may be regarded as elementary, and, therefore, requires no citation of authority. It was therefore incumbent upon the plaintiff to show neglect of duty on the part of the defendants. It is obvious that if the case were within the rule exempting the master from liability for negligence in some mere detail of the work, expert testimony could add nothing to the issue. But assuming, as did the courts below, that the defendants were responsible to the plaintiff, no less for the exercise of reasonable care in the construction and inspection of the derricks, than in the selection of their component parts, or in the employment of workmen, it becomes apparent that the expert testimony really decided the issue.

As we have seen, the breaking of the eyebolt proved nothing. It might have broken without negligence on the part of anyone. By the exigencies of his case plaintiff was ⁵³³ driven to the contention that the anchorage of both derricks to this single eyebolt was negligent and improper construction, for which the defendants were responsible. This was based upon the evidence of the experts Johnston and Rattray to the effect that the eyebolt was not heavy enough, and that the fastening to the same of two guys from opposite directions produced cross-strains upon the bolt which caused it to bend and finally to break. In the light of the foregoing considerations, let us examine the proper scope and limitations of expert testimony as applied to cases of this character. It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in

such cases, the jury, with all the facts before them, can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts. The distinction between these two kinds of testimony is apparent. In the one instance the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury.

The next step in the logical development of this inquiry is to ascertain to which of these two classes the case at bar belongs. If the knowledge of the experts consists in descriptive facts which can be intelligently communicated to others not familiar with the subject, the case belongs to the first class. If the subject is one as to which expert skill or knowledge can be communicated to others not versed in the particular ⁵³⁴ science or art only in the form of reasons, arguments or opinions, then it belongs to the second class: *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; *Roberts v. New York etc. R. R. Co.* 128 N. Y. 455, 28 N. E. 486; *Schneider v. Second Ave. R. R. Co.*, 133 N. Y. 583, 30 N. E. 752; *Parish v. Baird*, 160 N. Y. 302, 54 N. E. 724; *Van Wycklen v. Brooklyn*, 118 N. Y. 432, 24 N. E. 179; *Schwander v. Birge*, 46 Hun, 66. The mere statement of this rule seems, of necessity, to place this case in the first class. The structure which collapsed and caused plaintiff's injuries was a simple derrick such as is common for the hoisting of heavy materials. The particular defect in construction alleged consisted in the improper anchorage of two derricks to a single eyebolt placed between them. Whether this was defective, and therefore negligent, construction depended upon the amount and kind of strain to which the eyebolt was subjected, its size, its inherent tensile strength, and the character of its fastening into its base. These were subjects upon which the testimony of men skilled and experienced in the construction and use of derricks and their constituent parts could properly be received. But such testimony, within the limitations of the rule above adverted to, should have consisted wholly of facts from which a jury of average intelligence could form a conclusion as to the safety or sufficiency of the method of construction

employed. It was the province of the jury, not of the experts, to determine the latter question. In this view of the case, it was obvious error to permit the experts to express opinions which practically decided the only question that was to be submitted to the jury. Without dwelling in detail upon all of the testimony given by the experts, Johnston and Rattray, it is sufficient to refer to a single question addressed to each of them and their answers thereto, received under proper objection, which clearly reveal the inherent errors in the rulings under which this evidence was received.

These witnesses were asked the following question: "Assuming two derricks sixty or seventy feet apart, the mast of one about thirty feet tall, the mast of the other about forty feet tall, with booms twenty-five feet or so in length, placed upon a dock sixty or seventy feet apart ⁵³⁵ attached to a single eyebolt located midway between the derricks, but at an angle away from the derricks a little distance—so as to make the guy ropes approach the eyebolt diagonally—and the eyebolt being about ten or twelve inches long and an inch in thickness and inserted into wood perpendicularly, do you regard that eyebolt as sufficient or insufficient for the purpose of sustaining those derricks?" This question was objected to as irrelevant, incompetent, immaterial, and as not a question for expert evidence, and that the witness is not qualified to give expert evidence on that point and as calling for a conclusion. The trial court overruled this objection and under exception the experts were permitted to answer, "No, it was not sufficient." Without discussing the qualifications of the experts, but assuming for the purposes of this case that they were properly held to be competent to speak upon the subject under investigation, it seems clear that neither the questions nor the answers above referred to were within the rule applicable to cases of this character. The sufficiency of the derricks, or any of their parts, depended upon certain facts which a witness skilled in that kind of construction could easily have described and detailed to the jury. With these facts before them, the jury would have been entirely competent to have formed the conclusion which was testified to by the witnesses. The questions propounded to these witnesses were, moreover, insufficient and improper in form to lay the foundation for even such opinions as were given. It cannot escape notice that the questions make no reference to the tensile strength of such an eyebolt as was used. There is no allusion to the maximum or minimum strain upon such a bolt situated as it was in connection

with the use of either derrick separately or both together. Nor is there any statement as to the maximum or minimum weights which might with safety have been hoisted with either or both of these derricks as they were constructed. All of these elements, which were essential factors in determining the sufficiency or insufficiency of this eyebolt under the circumstances, were governed by what a learned jurist has aptly called "descriptive facts," which in turn ⁵³⁶ depended upon certain fixed physical laws. After having these placed before them, the jury would have been quite as competent to answer this question as the experts. Without these descriptive facts and physical laws by which they were governed before them, the jury could just as intelligently have decided this case upon the naked question whether they regarded this appliance as sufficient or insufficient, as they did upon the opinions of experts which were clearly unsupported by facts as a basis for the conclusion expressed.

These views lead to the conclusion that a new trial must be granted. The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., Gray, O'Brien, and Landon, JJ., concur.

Haight and Martin, JJ., dissent.

EXPERT WITNESSES, as a rule, merely give their opinions from undisputed facts, or facts hypothetically stated to them; they may, however, testify to general facts resulting from scientific knowledge or professional skill: Monographic note to *Hammond v. Woodman*, 66 Am. Dec. 231. See, too, the extended note to *Baltimore etc. Co. v. Cassell*, 59 Am. Rep. 177-186. An expert witness cannot be asked, to determine a question of negligence, whether a certain structure is safe: *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 Pac. 120.

PRESUMPTION OF NEGLIGENCE, when an injury has been suffered, is considered in the notes to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792-795; *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736-738.

THE LIABILITY OF A MASTER TO HIS SERVANT for defective scaffolding is considered in *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860; *Chicago etc. R. R. Co. v. Maroney*, 170 Ill. 520, 62 Am. St. Rep. 396, 42 N. E. 953; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225.

MATTER OF HUNTER.

[163 N. Y. 542, 57 N. E. 735.]

DEDICATION OF HIGHWAYS—SUFFICIENCY OF ACCEPTANCE OF.—A municipal ordinance directing the construction of a sewer through a strip of land, describing it as Rawson street, is a sufficient acceptance of an offer previously made by the land owner to dedicate such strip as a street.

A DEDICATION CANNOT BE REVOKED AFTER ACCEPTANCE.—An attempt to exercise a power of revoking a dedication of a public street after its acceptance by the city through the erection of fences and like acts is not a revocation, but merely a trespass.

Application to vacate a local assessment. The application was denied by the order of the special term, which was, however, reversed by the appellate division of the supreme court. Thereupon further appeal was prosecuted to this court. It was claimed that the street for the improvement of which the assessment was made was not a public street. The land, including the adjacent tracts, was owned by A. R. Hunter in 1873, at which time he caused a map of his property to be made. This map was filed in the office of the county clerk four years later. On it a street appeared designated as Rawson street, seventy feet in width. Subsequently to filing the map, Mr. Hunter conveyed several lots, describing them with reference to this street. From 1875 to 1890 the assessors of the city made their assessments of the property on Rawson street with reference to it, and no assessment was made of the land included within the street. In July, 1889, another map was made by Mr. Hunter, in which an open way was shown very nearly the same as Rawson street, but no name was attached to this way, and there was no evidence that this last map was ever filed with the county clerk. This open way, as indicated on the map of 1889, was used by pedestrians and also by drivers of vehicles as a public street for ten or fifteen years thereafter, and fences were constructed on each side thereof. No work was ever done upon Rawson street as laid out on the map of 1889 under the sanction of the city authorities until, on May 16, 1898, the common council adopted an ordinance authorizing the construction and laying of a sewer "along the center of Rawson street." On the 4th of June following, the respondent, as successor in interest of Hunter, caused Rawson street to be closed by fences, which remained until the 7th of July following, when they were removed under the direction of the common council.

Arthur L. Andrews, for the appellant.

W. Frothingham, for the respondent.

547 VANN, J. The undisputed evidence shows a clear intention on the part of Hunter and his successor in title to dedicate the land in question to the use of the public as a highway. He did not simply suffer it to lie open, unfenced, and undefined, but by unequivocal acts he made a tender of dedication of land, fenced as a street, laid down upon his own map as a street, and in constant use by the general public as a street. After he prepared the second map, and on the 10th of June, 1890, he conveyed abutting lots, bounding them on one side "by the west line of Rawson street," thus designating the open way on the map of 1889 as a street with that name. When the petitioner succeeded to his rights she did not attempt to revoke the dedication, but allowed matters to remain for five years as her husband had left them.

Assuming, but not deciding, that the power of revocation existed when the ordinance of May 16, 1898, went into effect, no attempt had then been made to exercise the right. The tender of dedication was still open to acceptance by the **548** city, and if that ordinance amounted to an acceptance, the land forthwith became a public highway. As was said by this court in *Cook v. Harris*, 61 N. Y. 448, 454: "Dedication and acceptance may be proved by the acts of the parties, and the circumstances of the case. The owner's acts and declarations should be such as to manifest an intention to abandon or devote his property to the specific public use. In the case of a highway, the public must accept the highway, and before such acceptance the dedication may be revoked. Such acceptance may be proved by long public use, or by the positive acts of the public authorities in recognizing and adopting the highway. No particular length of time is essential to make a dedication valid and irrevocable. The dedication and acceptance may both concur on a single day": See, also, 24 Am. & Eng. Ency. of Law, 6; Elliott on Roads and Streets, 89, 111; Dillon on Municipal Corporations, 4th ed., secs. 637, 638.

By the charter of the city of Albany, the members of the common council are made commissioners of highways: Laws 1883, tit. 3, c. 298, sec. 14. Any action by the common council showing a clear intention to recognize the strip of land in question as a street was an acceptance of it as a public highway. An ordinance directing the street to be graded, paved, or put in

proper condition for use by the public would have that effect: *Flack v. Green Island*, 122 N. Y. 107, 25 N. E. 267; *Cohoes v. Delaware etc. Canal Co.*, 134 N. Y. 402, 31 N. E. 887. A resolution formally and in terms accepting the street was unnecessary, for any official act on the part of the common council which treated it as a street and showed an intention to adopt it as one of the public streets of the city would be sufficient.

The ordinance of May 16th directed the construction of a sewer through the strip of land under consideration, calling it Rawson street, and treating it as a street the same as various other public streets in the neighborhood through or across which the sewer was to run. Twice in the title and three times in the body of the act it is referred to as Rawson street and recognized as a street the same as Third street, Colby ⁵⁴⁹ street and Livingston avenue. The presumption, always in favor of official action, is that the common council, by directing a sewer to be constructed through it, did not intend to do an illegal act or to trespass upon land belonging to another, but to treat it as the land of the city in trust for use as a street. The proper authorities, by using it as a street, accepted it as a street. The ordinance was as clear an assertion of authority over the land as a street as if it had directed the street commissioner to grade or pave it. The common council thus did an act which it had no right to do, unless it had accepted, or thereby accepted, the land as a street. If the ordinance had declared that the city accepted the strip of land already fenced, thrown open to and used by the public as a street for years, the intention would not have been more unequivocal than as shown by the direction to construct a sewer in it as a public street, and calling it by the name by which it had been known to the public for many years, for that action necessarily adopted it as a street. In effect, the common council said "we order a sewer to be built through the following streets of the city of Albany, and among others, through Rawson street."

It is true that the ordinance alludes to Rawson street "as declared by ordinance to be a public street." This may have referred to an ordinance passed but not put in evidence, or it may have referred to an ordinance proposed for greater safety but not yet adopted. This does not detract from the necessary effect of the acts directed to be done by the ordinance in question, which involved the assertion of dominion over the land as a public highway. We think the ordinance was an acceptance of the street, and that upon its approval by the mayor, two days

after its passage, Rawson street became a public highway, even if it had not become so before. We do not pass upon the effect of the first map prepared and filed by Mr. Hunter, his numerous conveyances of land with reference to it, the action of the city authorities in naming the street and constructing a crosswalk in it, the public user, the change in 1875, and the acquiescence of all concerned ⁵⁵⁰ therein. We place our decision upon the tender of dedication by Mr. Hunter in his lifetime, continued without interruption by the present owner for years after his death, and the acceptance of that tender, when still in full force, by the ordinance of May 16, 1898. Without reference to the earlier history of the street, we think this tender and acceptance were sufficient of themselves, independent of any other fact, to make Rawson street a lawful and irrevocable highway. When the street thus came into existence the power to revoke the dedication was ended, and the attempt to exercise the power after acceptance by the city, through the erection of fences, was not a revocation but simply a trespass. The courts below do not appear to have considered the effect of the ordinance of May 16th, possibly because counsel presented no claim with reference to the subject, as none was presented before us. While we regret that we have not the advantage of their views upon the question, we feel clear that the ordinance had the effect of an acceptance by treating the land as already an existing street and adopting it as such.

The order of the appellate division should be reversed and that of the special term affirmed, with costs in all courts.

Parker, C. J., O'Brien, Bartlett, Haight, and Cullen, JJ., concur.

Landon, J., not sitting.

A DEDICATION IS IRREVOCABLE when once accepted: See the monographic note to *State v. Trask*, 27 Am. Dec. 569; but an offer of dedication may be withdrawn before its acceptance: *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Prescott v. Edwards*, 117 Cal. 298, 59 Am. St. Rep. 186, 49 Pac. 736.

ACCEPTANCE OF A DEDICATION from user is discussed in the monographic note to *State v. Trask*, 27 Am. Dec. 564-566.

COSGRIFF v. DEWEY.

[164 N. Y. 1, 58 N. E. 1.]

COTENANCY—LIABILITY FOR ROCK QUARRIED.—A cotenant in possession who, without the authority or consent of his cotenants, quarries rock from the premises, crushes it, and sells it at a large profit, retaining the proceeds, is liable to account to his cotenants for the rock thus taken. Such rock is not the product of the land, but part of the land itself, and to the extent that it is taken operates as a diminution of the estate.

A. S. Tompkins, for the appellant.

I. Brown, for the respondents.

2 O'BRIEN, J. The parties to this action are tenants in common of a tract of mountainous land, the principal value of which consists of deposits of trap rock which is useful when manufactured into crushed stone.

The plaintiffs' interest is nine-sixteenths and the defendant's seven-sixteenths. From the pleadings and findings in the case it appears that the defendant was the tenant in possession, and that, without the consent or authority of the plaintiffs, his cotenants, he quarried large quantities of the trap rock, crushed the same and sold it at a large profit, without accounting to the plaintiffs for any part of the same. The purpose of the action was to compel such accounting and to procure a judgment against the defendant for the value of the stone removed from the land, beyond that proportion of the same that belonged to the defendant as one of the owners in common.

The trial court held that the plaintiffs were entitled to maintain the action, and a reference was ordered for the purpose **3** of ascertaining the value of the property taken by the defendant from the land and stating the account between the parties.

In the condition in which the record comes here the only question of law presented is the right of the plaintiffs to maintain the action. Of course, it is well understood that one tenant in common, in possession of the entire estate, is not liable to his cotenants for the use of the common property, or to account to them for rents and profits, and if this case is governed by that rule the judgment in favor of the plaintiffs is manifestly erroneous. But it is equally clear that one tenant in common may maintain an action against his cotenant in possession for waste (Code, sec. 1656), or for damages for a sale or conversion of the joint property, if it be personal: *Davis v. Lottich*, 46

N. Y. 393. The term "waste," when applied to a tenant in common, for life, or for years, has a very extensive meaning. It includes the opening of new mines upon the land to procure and carry away metals, coal, gravel, stone, or the like. So taking away the soil is waste, even though the purpose is to convert it into bricks for sale, and it has been held that a tenant in common who quarries stone from the common property is guilty of waste. So, also, is the taking of petroleum by one of the joint owners from the common property. Waste need not consist of loss of market value. It may be an actionable injury in the sense of destroying identity. The cases and authorities on this subject will be found collected in a recent work: 2 Rawle's *Bouvier's Law Dictionary*, 1216.

The stone which the defendant quarried and converted to his own use was a part of the freehold and, therefore, was the common property of all. It was not, in any proper sense, the product of the land, but was part of the land itself. It did not represent the use of the land or the rents and profits, but to the extent that it was taken by the defendant operated as a diminution of the estate. If the defendant had taken valuable timber from the land and sold it or converted it into lumber, there is no doubt, we think, that he would be liable ⁴ to account for its value to his cotenants. The act of taking timber and the act of taking stone, whether it be trap rock or marble, cannot be differentiated so far as the question of waste is concerned. Whether the stone which the defendant quarried upon the land and converted to his own use be considered personal property or part of the realty, he was bound to account to his cotenants for their proportion of its value: *Knope v. Nunn*, 151 N. Y. 506, 56 Am. St. Rep. 642, 45 N. E. 940; *McCabe v. McCabe*, 18 Hun, 153.

We think that the judgment must be affirmed, with costs.

Parker, C. J., Gray, Haight, Martin, Landon, and Werner, JJ., concur.

COTENANT, ACCOUNTING BY.—If a tenant in possession receives rents and profits, he must account therefor to his cotenant: See *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278; monographic note to *Early v. Friend*, 78 Am. Dec. 667. This principle, as applied to the working of mines, is discussed in the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 933.

PEOPLE v. BUFFALO FISH COMPANY.

[164 N. Y. 93, 58 N. E. 34.]

GAME LAWS—POSSESSION OUT OF SEASON—INTERSTATE LAWS.—A statute making it unlawful to have in possession certain kinds of fish during certain periods of the year, and imposing a penalty for its violation, applies only to fish taken from the waters of the state, and not to those imported from a foreign country or another state. The mere possession of such fish during the prohibited season is not in itself a violation of the statute, but it is *prima facie* a violation thereof, and casts upon the possessor the burden of proof to show that his possession is lawful. (Per O'Brien, J., Parker, C. J., Landon, J., and Werner, J. *Contra*, Gray, Haight and Martin, JJ.)

GAME LAWS—CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—A statute making it unlawful to have in possession certain kinds of fish during certain periods of the year, and imposing a penalty for its violation, in so far as it affects the possession and right of sale by citizens of the state of fish imported from a foreign country or another state, is in conflict with the power of Congress to regulate commerce, and to such extent is unconstitutional and void. (Per O'Brien, J., Landon, J., and Parker, C. J. *Contra*, Gray, Haight, and Martin, JJ.)

E. R. Brown, for the appellant.

W. L. Marcy, for the respondent.

⁹⁶ O'BRIEN, J. The statute of this state for the protection of fish and game forbids any person, under pain of indictment and civil penalties, to either "catch, kill, or be possessed" of certain fish named during what is called the close season therein prescribed. The defendant had in its possession during that season three different kinds of fish described in the statute, and this action was brought to recover the penalties denounced against offenders for violation of the law. The defendant in its answer alleged that its business is dealing in fresh fish on an extensive scale, and for that purpose maintains stores in various cities of the state; that it purchased the fish in question from dealers in Ontario and Manitoba, in Canada, imported it into this state for sale at Buffalo under ⁹⁷ the revenue laws of the United States, paying the duties thereon; that in so doing it was lawfully engaged in trade and commerce. The plaintiff demurred to this answer, thus admitting the facts, and insists that in law they do not constitute a defense. The courts below held that the demurrer was bad and that the facts constituted a good defense.

The appeal presents two questions: 1. With respect to the true meaning and scope of the statute; and 2. If it means what

the plaintiff insists it does, with respect to its validity. I think that the statute is valid when reasonably and fairly construed with reference to its purpose and object. It is a penal statute, and, therefore, not to be enlarged by construction or applied to cases not within the intention. We all agree that the purpose was to protect fish within the waters of this state. There is absolutely no room for disagreement on that point. The legislature had no interest or purpose to protect fish in a foreign country or in some other state, and had no power in that regard. Statutes should be construed, if possible, so as to avoid absurdity and manifest injustice: *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374. They should receive such construction as to render them practicable, just, and reasonably convenient: *Rosenplaenter v. Roessle*, 54 N. Y. 262. They should be construed to avoid, if possible, constitutional restrictions and understood in a sense within such limitations, rather than in conflict with them: *Sage v. Brooklyn*, 89 N. Y. 189. Their validity must be determined solely with reference to constitutional restrictions, and not by natural equity or justice: *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323. The statute in question does not in terms, or by any reasonable implication, forbid a person to "catch, kill, or be possessed" of fish in a foreign country. We all agree that our statute does not forbid a person to "catch or kill" fish of any kind in Manitoba, but it is said that when one brings the fish so caught or killed into this state the penalties of our statute attach to him at once. With all respect I am constrained to say that this is not a reasonable or tolerable interpretation of a penal statute. What it means and all it means is to forbid ⁹⁸ any person to catch, kill, or be possessed of the fish described from the waters of this state. The word "possessed" obviously refers to those fish the catching or killing of which is forbidden, that is to say, fish in the waters of this state, and not those procured in a foreign country. It is simply a perversion of the statute to hold that the mere possession by any person within this state of the fish described in the statute during the close season is a violation of it, without regard to the place where it was procured, or to the manner obtained: *Commonwealth v. Hall*, 128 Mass. 410, 35 Am. Rep. 387; *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1.

It has long been the practice with keepers of summer hotels in this state to purchase at the proper season of the year in Canada, and in other states, game in large quantities and preserve it in cold storage for use in the close season, but, if this

statute is to receive the narrow and literal reading contended for, they are all subject to indictment and civil penalties, since they are certainly possessed of this game during the forbidden period. There is scarcely a county of this state in which private fish ponds are not to be found, constructed and maintained by private persons on their own land, in which fish of the species described in the statute are kept and propagated. The fish in such ponds are private property. They have been reduced to possession and are within the dominion of the owner. Is it a violation of the statute for a person to catch or kill fish from his own private pond? If it is, and the owner refrains from it during the close season, he will still violate the law, since he is possessed of the fish all the time, and the only way he can escape from the pains and penalties of the statute is to open the pond and let the fish out.

In the case at bar, the statute is pushed by a literal reading to a point quite as unreasonable. In my opinion, the law has no reference or application to a case where the fish have been imported from a foreign country. The conceded facts of this case take it out of the reason and policy of the law.

But it is argued that unless the statute is construed to inhibit the possession, during the close season, of fish ^{or} imported from a foreign country, it cannot be enforced, but will be evaded by false swearing. This means that if the summer hotel keeper, the owner of the private pond and the foreign importer, under the circumstances stated, are allowed to escape, then some one else may falsely pretend that his possession of fish during the close season was obtained in a similar manner, when in fact he is really guilty of violating the law by procuring them from the waters of the state. This argument seems to be based upon the notion that unless the innocent are convicted the guilty may escape. It assumes that in the interpretation of a penal statute, such a remote danger must be anticipated and guarded against. I think it puts rather too much faith in the potency of perjury as a defense to an honest claim, and too little in the capacity of courts and juries to distinguish truth from falsehood. When it was proposed to change the criminal law and permit an accused person to testify in his own behalf, the proposition was for a long time resisted by similar arguments. It was said that the temptation to swear falsely under such circumstances was so great that crime could never be punished if the accused was permitted to testify in his own behalf; whereas experience has shown that a person on trial for a penal

offense very rarely, if ever, helps his case by falsehood. Indeed, it may be safely asserted that the new law, instead of thwarting justice, as anticipated, has been a very great aid in the enforcement of the criminal law. There is not the slightest reason for giving a strained and unnatural construction to the statute in question in order to meet such an imaginary danger. The possession of the fish or game at the forbidden season, within this state, is *prima facie* evidence that the possessor has violated the law, and the burden is then cast upon him of proving facts to show that the possession was lawful. If he has no better defense than one based on falsehood, it will be entirely safe to trust to the power of cross-examination and the intelligence of the court and jury to detect and expose it, as in offenses of much greater magnitude. The contention of the people in this case is virtually to the effect that possession in all cases, ¹⁰⁰ instead of being *prima facie* proof, is conclusive, and no facts can be shown to explain or to take the case out of the statute. The accused would not even be permitted to show that he acquired the possession within the state at a time when it was perfectly lawful to do so.

But if this is what the statute means, and it is to be held that the conceded facts of this case are within its penal provisions, then I think it is clearly invalid, as in conflict with the commerce clause of the federal constitution. In this view of the case, the question, and the only question, is whether a state statute can be lawfully enacted to prohibit a citizen of this state from buying fish in Canada, importing it into this state under the revenue regulations of the United States, and exposing it for sale here. There is no question at all about the competency of the states, in the exercise of the police power, to enact game laws. The question is whether such laws can be so framed as to prohibit or restrict by penal provisions the importation of an article of food in universal use. That fish is such an article of food and the subject of foreign and interstate commerce, I assume no one will deny. That the purchase of fish for food in a foreign country and its importation here for sale, as such, is a branch of foreign commerce, is too clear for discussion. That the statute in question forbids the possession, and consequently the sale here, of an important article of food, is equally clear. Upon the construction contended for, the penal provisions of the statute absolutely inhibit the possession of the property at a season of the year when it is most in demand as an article of food. That the statute operates as a

restriction upon the defendant's business as an importer and dealer in fish, no one can doubt. That a statute so operating is in conflict with the exclusive power of Congress to regulate foreign commerce is not questioned, and yet the contention is made with great earnestness that this statute is perfectly valid. The reasoning upon which this conclusion is based, if I understand it, is that the state has power to pass game laws, which no one denies; that the object of this statute was to protect game in this state and ¹⁰¹ not to interfere in any way with foreign commerce, and, since the purpose that the legislature had in view was lawful and laudable, the statute is good, although, in fact, it does prohibit or restrict the importation of fresh fish as an article of food. If the legislature did not intend to restrict foreign commerce, as is asserted, then it is obvious that the statute should be read and interpreted according to that intention, in which event it would have no application to the facts of this case; but, strangely enough, it is given a meaning which imputes to the law-makers just the contrary, since it is said that the possession of imported fish is in terms inhibited. The good intentions of the legislature will not save a state statute from condemnation when it in fact conflicts with the supreme law of the land. If it restricts the freedom of commerce, as this certainly does, then it is void, no matter what name may have been given to it, or what good purpose it was intended to promote. An act to protect game, or to promote health may be so framed and applied as to restrict or regulate traffic in some article of commerce, and when it does it is just as obnoxious as if passed for that purpose under a title expressing that very intent. It will not do to hold that the constitution can never be violated except when the legislature intends to. It is frequently violated with the very best intentions: *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257.

I pass over the suggestion that the statute may be considered as a health law and applied as such, since the sport of fishing and hunting promotes health. The number of people that can indulge in the sport are so few, comparatively, and the number who are obliged to buy fish in the market for food so large, relatively, that a defense of the law as an agent or handmaid of the public health cannot be taken quite seriously. Reasoning of that kind enables us to deceive ourselves with names and words, but fails to prove that a law which prohibits the sale of a healthy article of food, imported from a foreign country, is a valid exercise of power. It might as well be

argued that a statute prohibiting the sale or possession of intoxicating liquors imported from abroad or from another ¹⁰² state is not what it professes to be, but a health law in disguise, since it operates to restrain a few people from ruining their health by excessive drinking. The question in this case is not solved or advanced one step by arguments to show that the statute is a healthful exercise by the state of the police power with respect to internal objects. We must always come back to the inquiry as to its effect upon trade in an article of food, when applied to the conceded facts of this case.

The law on the question has so often been stated by the highest court of the land, in accordance with the rules already stated, that much further discussion would be out of place. I will recall only a few of the more recent cases. In *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, it was held that a state has no power to enact laws for the purpose of protecting its people against the evils of intemperance, which, in fact, operate to regulate commerce and forbid the importation into the state of intoxicating liquors without a certificate first obtained from the state authorities that the person to whom the goods are consigned is authorized to sell liquor under the state law, although the act was passed without any purpose of affecting interstate commerce, but as a police regulation to protect the health and morals of the people. The same doctrine was repeated in a more recent case: *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. Rep. 265. It was again held in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, that liquors are lawful subjects of commerce and a state is without power to restrict or prohibit their importation from a sister state, nor, when imported, prohibit their sale. In *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, it was held that a state statute, conceded to have been passed in good faith for the protection of the public health, which forbids the sale within the state of certain meat products, unless the animals were first inspected therein before they were killed, is unconstitutional and void. The same doctrine was subsequently reaffirmed: *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213.

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, it was held that a statute of the state which forbids any person from ¹⁰³ selling, exposing for sale, or having in possession oleomargarine was invalid, in so far as it operated to prohibit the introduction of the article into the state from an-

other state. It was admitted that all these statutes were based upon the undoubted police power of the state to protect health and morals, but the good intentions with which they were enacted did not save them from condemnation, since they operated as a regulation of, or restriction upon, interstate commerce, and so far as they had that operation they were void.

If there is any difference in principle, or any sound or reasonable distinction pertinent to the question now before us, between a statute intended to protect fish, and to foster and promote sport, or the pastime of hunting and fishing, and those to protect health by providing for an inspection of animals to be used as meat, to promote temperance and morality by forbidding the sale of liquors, or to suppress fraud by restricting the sale of imitation butter as food, I have not been able to perceive it, and I may add that no one has yet attempted to state it. If there is any distinction at all it would be against and not in support of a statute intended only to promote sport and pleasure. That is all laudable enough, but not so important to the body politic as laws to protect health, or suppress crime and promote morality, all of which have been held to be void when so framed as to regulate or restrict interstate or foreign commerce. If the statute in question has the meaning and effect claimed for it, then its operation cannot be better illustrated than by the admitted facts of this case.

It seems that had the defendant at the time it imported fish also imported meat, liquors, or oleomargarine, all the latter articles would be protected from state laws restricting their sale or possession by the commerce clause of the constitution, while the fish would be subject to the penal restrictions of the game laws. I cannot believe that this is a reasonable or tenable view of the law applicable to this case.

It will not be profitable to review or discuss the game laws of other states or countries, or the decisions of local courts interpreting the same. It may be admitted that these states ¹⁰⁴ have game laws as drastic as our own, but that has no bearing on the question now before us. The learned counsel for the plaintiff has not found any authority in any state court to sustain the proposition that game laws, however framed, can be so applied as to prohibit the importation of an article of food in general use from a foreign country or another state into this state and exposing it for sale here. It must always be borne in mind that this is the only question that we are now concerned with. The statutes and decisions in other states furnish

no light on this question. Indeed, the strongest case that the learned counsel for the people has been able to find in favor of his contention is one decided by this court: *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140. But it is admitted that the principle upon which that case was decided was subsequently overruled by the supreme court of the United States, and that upon the question now under consideration it is no longer law: *Peirce v. New Hampshire*, 5 How. 504; *Leisy v. Hardin*, 135 U. S. 100, 118, 10 Sup. Ct. Rep. 681; *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 507, 8 Sup. Ct. Rep. 1062. That case rests entirely upon the proposition that a state law regulating foreign or interstate commerce is valid unless Congress has made some regulation on the subject, a principle which has been completely overthrown by the court of last resort, as will be seen from an examination of the cases cited.

Passing from the collection of state statutes for the protection of fish and game and the decisions of state courts as to their scope and effect, which occupy such a prominent place in the brief of the learned counsel for the people, it would perhaps be unjust to his argument to ignore two cases in the federal court which he claims support his contention in some way. If they do, they are entitled to great weight and consideration, since the decisions of that court upon this question are the supreme law of the land. If they do not, it may be safely asserted that the learned counsel has found no controlling authority to support the proposition that a state may enact a statute which makes it a penal offense for the defendant to buy fish in the markets of Manitoba or Ontario in ¹⁰⁵ Canada, import it into this state and have it in his possession at Buffalo. If the court of last resort has ever said anything tending to support this proposition, even by construction or fair implication, it is doubtless authority binding upon this court. But it is very clear, I think, that it has not.

Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499: That case decided three propositions, none of which have any relation to this case: 1. That the state had the power to regulate the manner of taking fish from waters within its jurisdiction; 2. That it had power to forbid fishing in such waters with nets; 3. That the nets destroyed in that case, being of comparatively small value, the state had power to declare them a nuisance and summarily abate them.

Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. Rep. 600: That case decides the following points: 1. That a state statute

which forbids the killing of game for the purpose of conveying the same beyond the limits of the state, or having it in possession with that intent, is valid; 2. That wild game within the state belongs to the whole people in common, and that legislation to prevent its extinction by conveying it out of the state was not in conflict with the constitution; 3. That the individual who caught or killed it within the state acquired not an absolute, but a qualified, property in it, since the use or enjoyment was limited to the boundaries of the state; 4. That since the use or enjoyment was limited to the people of the state it was not the subject of foreign or interstate commerce, though it was the subject of internal commerce; 5. Not being the subject of foreign or interstate commerce, but merely of internal commerce, the statute was not in conflict with the commerce clause of the federal constitution.

Every proposition embraced in these two cases may be and is freely admitted, but not one of them has any bearing on this case. In the first case it was held that the state had power to forbid fishing with nets, and, in order to make the prohibition effectual, to declare the nets a nuisance and destroy them summarily without liability for compensation. In the second case, it was held that, inasmuch as the state owned all ¹⁰⁶ the game within its limits, it might legislate to keep it there, and could forbid anyone from conveying it out of the state and enforce such prohibition. But I am unable to see how all this or anything in those cases helps the plaintiff's position in this case. Here the defendant bought fish in Canada as a commercial article, where it was lawfully exposed for sale, imported it into this state under revenue laws, and had what was clearly his own property in his possession, and because he is possessed of his own property so acquired the statute in question subjects him to indictment and civil penalties. It would be difficult in this view to imagine a plainer or more direct interference with foreign commerce than this case presents.

The main proposition, after all, in support of the plaintiff's contention is based more upon policy and expediency than upon law. When fairly stated it is this: A statute to protect fish and game within the state does not protect unless it inhibits the importation of fish and game from a foreign country or another state. When this proposition is carefully examined, it will be found to be not only without any foundation in fact, or in experience, but when applied to cases like the one in hand the manifest tendency is to defeat the very object of the law, which,

of course, must be assumed to be protection. The individual who is permitted to hunt and fish in Canada or in another state, and bring with him here the fruits of his labor, will do very much less of hunting and fishing at home. If this warfare upon game or fish is carried on in a foreign country, or in another state, it would seem to be unwise to prevent him for the purpose of protecting fish and game at home. The game law that cuts off the supply from abroad diminishes rather than increases and protects the supply at home. Legislation that would prohibit the defendant from drawing a supply of fresh fish from Canada during the close season simply furnishes a strong temptation to procure it from the waters of this state, even in violation of law. It is said that there is a passion inherent in man to kill or capture game in spite of penal laws forbidding it. If that be so, it would seem to be wisdom to allow the passion to expend itself by permitting ¹⁰⁷ those who enjoy it to capture and become possessed of fish or game in Canada, or in other states where the law permits it, rather than furnish a temptation to violate the law at home during the close season. To forbid the taking of fish in a foreign country, or in another state where it is lawful, by our own citizens during the season, or the possession within the state of what is so taken, tends to exterminate rather than protect fish here. The legislator who would protect the forests of this state by prohibiting the importation of lumber or timber from Canada, or from other states, would be rated as a visionary theorist, but in a certain degree that is the principle upon which the argument for the people in this case proceeds for the protection of fish and game. What is true with respect to the forests is equally true of every other natural product of the soil or of the waters of the state, so that it is plain that the plaintiff's theory of this case, when put into complete operation all around the boundaries of the state would, instead of protecting fish and game, go far to exterminate both.

But all these considerations are subordinate and collateral to the main question, and when they are all weighed and examined we are brought back again to the real situation which the case presents. Admitting, for the purposes of the argument, that the statute in question means just what the plaintiff's counsel claims for it, the important fact still remains that Congress has permitted the defendant to import fresh fish upon payment of certain duties. It has paid the duties and complied with the federal regulations, but when the article is brought here the state steps in and forbids the defendant to have it in its pos-

session, and, of course, forbids the sale. This creates a direct conflict between the regulations of Congress and those of the state, and, consequently, the latter must yield to the former. The state had no power to extend its police legislation to such a transaction, and, of course, had no power to forbid what Congress had expressly permitted.

The case, in my opinion, was correctly decided by the courts below, and the judgment should be affirmed, with costs.

MR. JUSTICE GRAY, with whom Haight and Martin, JJ., concurred, in his dissenting opinion said: "It is not, nor can it be seriously contended, as I think, that the law is in conflict with any of the provisions of the constitution of the state. The case of *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, should be conclusive upon that point, whatever may be said of it upon the federal questions raised. The federal question is, whether the statute, in the particular feature in question, violates, or infringes upon, the provisions of the constitution of the United States which authorize Congress to regulate commerce with foreign nations and between the states. In speaking of the argument that the law violated the commerce clause of the federal constitution, Chief Justice Church, in *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, deemed it unnecessary to consider, 'how far the exercise of the power of Congress under the provision would interfere with the authority of the state to pass game laws, and regulate and prohibit the sale and possession of game either as a sanitary measure or for its protection as an article of food. It will suffice for this case that the statute does not conflict with any law which Congress has passed on the subject.' The authority of this case upon the constitutional right to enact such laws has been widely recognized in the state courts, where similar statutory provisions were assailed, and, among other cases, might be cited those of *Magner v. People*, 97 Ill. 320, *Commonwealth v. Savage*, 155 Mass. 278, 29 N. E. 468, *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098, and *Roth v. State*, 7 Ohio C. C. 62. In England the case of *Whitehead v. Smithers*, L. R. 2 C. P. D. 553, may be referred to as in point, where Chief Justice Coleridge observed of the act for the protection of wild fowl, passed in 1876, that 'the object is to prevent British wild fowl from being improperly killed and sold under pretense of their being imported from abroad.' And see *Price v. Bradley*, L. R. 16 Q. B. Div. 148, upon the fresh water fisheries act.

"In the court below, *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, was deemed to be no longer controlling; for the reason that its principles have been 'overruled by subsequent judicial authority.' The reference is to that part of the opinion which suggests the proposition that, in the absence of the enactment of a law by Congress, the states may regulate commerce among themselves.

This doctrine, though supported by authority at the time (*Pelree v. New Hampshire*, 5 How. 504), would seem to have been overruled by later cases (*Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681; and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757), which hold that laws inhibiting the receipt of an imported commodity, or its disposition, amount essentially to a regulation of commerce with foreign nations, or among the states. I consider, however, that the fisheries law presents no conflict with the commerce clause of the federal constitution, and that it is purely a governmental regulation, within the legitimate exercise of the police power of the state, relating to a matter essentially of an internal policy as affected by a common public interest. . . . In *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, a case arising under the Connecticut statute in relation to game birds, it was said that 'the right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. Indeed, the source of the police power as to game birds . . . flows from the duty of the state to preserve for its people a valuable food supply': Citing *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, and other cases. In *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, affirming our decision in 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, the police power of the state was discussed and it was said that 'the preservation of game and fish has always been treated as within the proper domain of the police power,' and that 'the state may interfere whenever the public interests demand it and in this particular a larger discretion is necessarily vested in the legislature, to determine, not only what the public interests require, but what measures are necessary for the protection of such interests': Citing cases. 'It must appear,' the opinion holds, '1. That the interests of the public generally, as distinguished from those of a particular class, require such interference; and 2. That the measures are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.'

"The object of this statute was to protect and preserve certain game fishes during the breeding season; an object, manifestly, in which the people of the state may be presumed to be more or less keenly interested and which is recognized, as Judge Church observed, in all civilized countries. The purpose is to protect certain fishes within our jurisdiction, with no reference to those of other states, or countries. If they may be brought into the state within the close season here, as articles of commerce protected by United States laws and, therefore, placed beyond the reach of state laws declaring and regulating an internal policy, the result would be to facilitate evasions of the law and to make detection difficult, if not impossible. The general tendencies of human nature, it might not inappropriately be observed, are such as to make necessary so

strict a law as to render obedience to the mandate certain. The statute aims at preventing game fishes from being unlawfully taken and exterminated, and any regulation which tends to secure that aim should be regarded as a legitimate and fair exercise of the police power.

"Not an arbitrary, but a wise and politic purpose, is evident in this statutory regulation, touching as it does the interests of the people in a form of food supply, as in a form of sport. I cannot understand its being likened to such legislation as was condemned in *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257. There the act required all goods made by contract labor to be labeled 'convict made,' when possessed and offered for sale, and it was held to be repugnant to the commerce clause of the federal constitution, because 'a regulation of commerce by means of which the value of merchandise made in another state was to be depressed, or its sale prohibited.' It was a restriction upon the freedom of commerce to permit the same articles to be put upon the market freely, if made in factories, when, if made in a prison in another state, a citizen, having lawfully purchased them, could not expose them for sale without branding or labeling them as 'convict made.'

"Nor can I perceive that the doctrine of the oleomargarine cases is applicable: *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757. There is a clear distinction between legislation which discriminates with reference to a manufactured food product, not impure nor unhealthful, and legislation which seeks to preserve the game fishes within the waters of the state, either as a natural article of food supply, or as a form of public sport. In the one case, there is an interference with commerce, as commerce; in the other case, commerce is not aimed at, but the preservation from extermination of the people's property in game fishes. In the one case, there is interference with commercial dealing in a manufactured product, which, not unreasonably, may be said to lack justification in those ordinarily recognized principles upon which the police power of the state is properly exercised; while, in the other case, the preservation from extermination of the game fishes within the jurisdiction of the state reasonably commends itself as legislation in the interest of preserving to the people a valuable natural and common food supply, which is deemed in danger of being destroyed and which it is, therefore, the duty of the state to prevent by the exercise of its undoubted police power. I think, if importations may be excluded which might affect the public health, that they may be excluded if tending to endanger the enforcement of a law intended to protect and to preserve the people's property right in game and fish. There is no danger that legislative encroachments upon individual rights will be encouraged by such a decision. The presumption which obtains in favor of the constitutionality of legislative acts is not met here by any reasonable ob-

jection. The only and the evident object of the statute is to protect the game fishes mentioned during a season allowed for breeding and development and must surely be within the range of the duties of state government. I think that the judgment should be reversed and that the questions certified should be answered in the negative."

GAME LAWS—GAME KILLED OUT OF STATE.—A statute making it criminal for a person to have in his possession or to purchase or sell certain game at times designated therein is constitutional, though applicable to game killed outside of the state where such killing was lawful: *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *State v. Schuman*, 36 Or. 16, 78 Am. St. Rep. 754, 58 Pac. 661. Contra, *Dickhaut v. State*, 85 Md. 451, 60 Am. St. Rep. 332, 37 Atl. 21. Such a statute is not unconstitutional as an attempted and forbidden regulation of interstate commerce: *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402.

MATTER OF MEEKIN.

[164 N. Y. 145, 58 N. E. 50.]

DEATH, DAMAGES FOR, WHEN BELONG TO NEXT OF KIN.—A statute creating a right of action in favor of the representatives of a decedent who left a husband, wife, or next of kin to maintain an action to recover damages for a wrongful act, neglect, or default, by which decedent's death was caused, against anyone who would have been liable to such decedent, if his death had not ensued, and finding that such damages are to be recovered exclusively for the benefit of such husband, wife, and next of kin, and, when collected, to be distributed as if they were unbequeathed assets left in his hands after payment of all debts and expenses of administration, confers a right to recover for wrongs done to the property rights and interests of another, and not for injuries to the person of the decedent.

THE AMOUNT OF DAMAGES RECOVERABLE in favor of the husband, wife, and next of kin of a decedent in an action by his personal representative against one wrongfully causing his death depends upon the value of the reasonable expectation of pecuniary benefits from the continuance in life of such decedent to such husband, wife, and next of kin. The damages bear interest from the date of the death.

DEATH—SURVIVAL OF CAUSE OF ACTION FOR.—Under a statute creating a cause of action in favor of the representative of a person whose death has been wrongfully caused by another, the proceeds of the recovery to be distributed to the husband and wife and next of kin of the decedent, the cause of action survives on the death of the next of kin, who is also the administrator of the decedent, and his personal representative may be substituted as plaintiff in his place.

Action brought October 5, 1899, by Charles Meekin, as administrator of his deceased daughter, to recover damages for

wrongfully causing her death. The administrator was the father and next of kin of the decedent. He died after the issue was joined, but before the action had been placed on the calendar for trial. Thereafter his administratrix was appointed and applied for an order to revive and continue the action in her name, as plaintiff. The order of revival was granted, and the defendant railroad company thereupon appealed to the appellate division of the second department, which affirmed the judgment, except the award for costs. Leave to appeal from the order of affirmance was granted, and the following question certified for decision: "Does an action to recover damages for negligently causing the death of his intestate survive the death of the administrator, who was also the father and sole next of kin of the deceased, where such intestate left her surviving other persons, who, had such father not survived said intestate, would have been next of kin of such deceased?"

John L. Wells, for the appellant.

Isaac M. Kapper, for the respondent.

147 VANN, J. By the act of 1847, now substantially embodied in the Code of Civil Procedure, a right of action, unknown to the common law, was created, which has since been perpetuated by the revised constitution: Laws 1847, c. 450; Const., art. 1, sec. 18. The personal representatives of a decedent who left a husband, wife, or next of kin are authorized to "maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued": Code Civ. Proc., sec. 1902. The damages recovered in such an action "are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff as if they were unbequeathed assets left in his hands, after payment of all debts, and expenses of administration": Code Civ. Proc., sec. 1903. "The damages awarded to the plaintiff may be such a sum as the jury . . . deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought": Code Civ. Proc., sec. 1904.

The Revised Statutes, which are modified to some extent by these provisions of the code, authorize an executor or adminis-

trator to maintain an action "for wrongs done to the property rights or interests of another," after his death, against the wrongdoer, and after his death "against his executors ¹⁴⁸ or administrators in the same manner and with the like effect in all respects as actions founded upon contract." This provision, however, does not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions "for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator": 2 Rev. Stats., 9th ed., 1907.

The question, therefore, is whether the right of action created by the act of 1847, and continued by the Code of Civil Procedure, is to recover damages for wrongs done to the property rights or interests of another, or for injuries to the person of the decedent. Some confusion has arisen because the statute creates a property right out of an injury to the person, and confers it, not upon the one injured, but upon his representatives for the benefit of his wife and next of kin. The theory of the statute is that damages should be recovered for injuries to the estate of the beneficiaries of the action, which injuries were caused by the death of the decedent. The beneficiaries named in the statute sustain such a legal relation to the deceased by blood or marriage that it is presumed they would have been pecuniarily benefited by his continuance in life, and hence damages are allowed for a wrongful act or omission causing his death. If he had lived, the support, education, or services required from him by law, as well as benefits in the nature of gifts conferred in the past, might have been continued, to the pecuniary advantage of the beneficiary. So, the decedent, by continuing to live, might increase his estate and thus increase the amount to be inherited from him upon his death in the course of nature. Hence, the statute declares that the damages awarded shall be a fair and just compensation for the pecuniary injuries resulting from the death, not to the person injured, but to the person for whose benefit the action is brought. While a personal injury must cause the death, damages are allowed, not for an injury to the person deceased, but for an injury to the estate of the beneficiary. The statute thus contemplates the indirect rather than the direct effect of the wrongful act. This is evident ¹⁴⁹ from the well-settled law that nothing can be recovered for the pain or suffering of the deceased, if he lingers before dying, or for punitive damages, even when aggravating circumstances would warrant them if the action were between the person injured and

a person inflicting the injury. The amount of damages in this class of cases depends upon the value of the reasonable expectation of pecuniary benefits from the continuance in life by the decedent to the husband or wife and next of kin. This is a right of property which becomes vested in the beneficiaries at the moment of death and can be converted into money through a statutory action brought for their benefit by the personal representatives, who are simply trustees for the purpose: *Wooden v. Western New York etc. R. R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050. The damages bear interest from the date of the death, in accordance with the general rule relating to injuries to property, which is never applied in cases of injury to the person. When collected, the damages are distributed "as if they were unbequeathed assets." Thus the statute creates a right of action for damages to the estate of the beneficiaries, caused by a wrongful act or omission, which deprived them of some pecuniary benefit reasonably to be expected from the continuance in life of the decedent. That right of action was the property of the beneficiary which was not forfeited by his death, but became a part of his estate. No order of revivor would have been necessary in this case if the beneficiary had not been the sole administrator. The weight of authority is in accordance with these views, although the gradual development of the law upon the subject has resulted in some diversity of opinion. While the question was not up in one of the early cases, it was touched upon during the discussion: *Oldfield v. New York etc. R. R. Co.*, 14 N. Y. 310, 316.

In *Quin v. Moore*, 15 N. Y. 432, it was held that the interest of the beneficiary was capable of assignment, which is a test of the right to revive. In deciding the case the court said: "The interest of Mrs. Kerns was also assignable. In respect to purely personal torts, it is true that at common law, ¹⁵⁰ the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the statute comes in and declares that a right of action shall survive to the administrator. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account. These would

be the foundation of the action, and would furnish the criterion of damages, if death had not ensued, and the injured party had brought the suit. But the claim of the administrator, and through him the next of kin, is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. For example, in the present case, James Kerns was a minor; his mother was, by law, entitled to his services until he should come of age; of these she was deprived by the wrongful or negligent act of the defendants, which destroyed his life. The common law gave no action for this injury. The statute, possibly with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation. . . . The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the legislature have chosen to regard as a pecuniary right; a right having the essential attributes of property, so that when it is taken away compensation is due." In a later case it was said in a dissenting opinion, written by the same judge, that these views were, in some respects, not well considered: *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, 489. The cases must be read in connection with the statute in force at the time they arose, and hence *Dickins v. New York Cent. R. R. Co.*, 23 N. Y. 158, has no significance, because the act did not include the husband as a beneficiary.

When the *Tilley* case was first before the court, it was held that there could be no recovery for the expectancy of the ¹⁵¹ children of a married woman from her earnings, because, as the law then stood, such earnings became the property of her husband as soon as realized. The question relating to the value of "probable succession" was discussed with a strong intimation that it was the proper basis of damages: *Tilley v. Hudson River R. R. Co.*, 24 N. Y. 471, 474.

That case came before the court a second time in 29 N. Y. 252, 86 Am. Dec. 297, where it was held that in an action for negligence, resulting in the death of a mother, evidence of her capacity for business and to save money, and also to bestow upon her children such training, instruction, and education as would be pecuniarily serviceable to them in after life, is admissible on the question of damages. In the course of its opinion the court said with reference to these elements of damages that: "It is not essential to show that they necessarily result in direct pecuniary advantage; it is sufficient that they may do so; that

they often do so; that it is possible and not improbable that such may be the result, and that, therefore, these items may be set forth and presented for the consideration and deliberation of the jury, to be disposed of as they shall deem to be just." To the same effect are *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287, 289, *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445, 98 Am. Dec. 67, and *McGovern v. New York etc. R. R. Co.*, 67 N. Y. 417, 424.

In *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192, 194, 31 Am. Rep. 459, the court said: "The rights and interests for tortious injuries, to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished." That is, by diminishing his estate, the value of the right of inheritance is diminished, and thus the beneficiaries are injured in their estate.

In *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787, it was held that the cause of action for damages from negligence resulting in death abates upon the death of the wrongdoer, and that an action cannot be maintained against his representatives. This is a ¹⁵² necessary result from the fact that the code modifies the Revised Statutes and the common law only as to the personal representatives of the person injured, and not as to those of the person who inflicted the injury.

In *Littlewood v. Mayor etc.*, 89 N. Y. 24, 42 Am. Rep. 271, it was held that "when one injured by the wrongful act, neglect, or default of another brings suit and recovers damages for the injury in his lifetime, in case death subsequently results from the injury, his personal representatives cannot maintain an action under the act of 1847." As a matter of course, the beneficiaries, in the absence at least of express authority from the legislature, could not have in effect a double recovery: 1. Through the settlement with the intestate and inheritance from him; and 2. Through the action under the statute.

It appears from an examination of the record in *Thomas v. Utica etc. R. R. Co.*, 6 Civ. Proc. Rep. 353, 34 Hun, 626, 98 N. Y. 619, that the trial court submitted to the jury the following question upon the subject of damages: "What was the reasonable expectation of pecuniary benefit to the next of kin, by inheritance or otherwise, from the continuance in life of the deceased, worth in money?" In that case the deceased was an

unmarried man who left him surviving only brothers and sisters and children of deceased brothers or sisters, and it was held in all the courts that the question submitted to the jury embraced the correct measure of damages.

So in *Keenan v. Brooklyn City R. R. Co.*, 145 N. Y. 348, 350, 39 N. E. 711, it was said: "The jury, in determining the amount of damages that should be awarded, was in duty bound to consider the various elements of pecuniary loss sustained by the father. First, the probable earnings of the son during his minority over and above his support, clothing, and education; next, the probability of his living and becoming of sufficient ability to support his father in case of his becoming aged, poor, and unable to support himself; and then they had the right to consider the amount he would have brought to his next of kin while living and their prospect of inheriting ¹⁵³ from him after death: *Johnson v. Long Island R. R. Co.*, 80 Hun, 306, 30 N. Y. Supp. 318; affirmed in this court, 144 N. Y. 719, 39 N. E. 857." See, also, *Thomas on Negligence*, 465; *Sedgwick on Damages*, sec. 572; 3 *Sutherland on Damages*, 282; *Terry v. Jewett*, 78 N. Y. 338; *Kellogg v. New York etc. R. R. Co.*, 79 N. Y. 72; *Murphy v. New York etc. R. R. Co.*, 88 N. Y. 445; *Houghkirk v. Delaware etc. Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Harlinger v. New York etc. R. R. Co.*, 92 N. Y. 661; *Lockwood v. New York etc. R. R. Co.*, 98 N. Y. 523; *Mundt v. Glogner*, 24 App. Div. 110, 48 N. Y. Supp. 940.

Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries, but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from and not a revivor of the cause of action, which, if he had survived, he would have had for his bodily injury. "Although the action can be maintained only in the cases in which it could have been brought by the deceased, if he had survived, the damages nevertheless are given upon different principles and for different causes. In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for

his pecuniary loss, and in addition for his pain and suffering of mind and body, while under the statute it is not the recompense which would have belonged to him which is awarded to his personal representative, but the damages are to be estimated with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person": *Whitford v. Panama R. R. Co.*, 23 N. Y. 465. As, in the language of the statute, "the damages awarded to the plaintiff" are to be estimated on the basis of "a fair and just compensation for the pecuniary injuries resulting from ¹⁵⁴ the decedent's death to the person or persons for whose benefit the action is brought," we think the injury is for a wrong done "to the property rights or interests" of the beneficiary, and that, hence, the cause of action survives, the recovery, if any, being a part of his estate, the same as it would have been if collected and paid over before his death.

The order appealed from should, therefore, be affirmed, with costs, and the question certified to us answered in the affirmative.

Parker, C. J., O'Brien, Bartlett, Haight, Landon, and Cullen, JJ., concur.

THE PRINCIPAL CASE, in so far as it holds that a recovery under the statute referred to is for the wrong or injury done the persons for whose benefit the cause of action was created, seems to be reasonable, and it is somewhat strange that any decisions should be found inconsistent with it in principle. Of course, if the cause of action is one not only for the benefit of the husband or wife and next of kin, but is also founded upon an injury done to them, it would seem that the defendant should be entitled to show in his defense any circumstances which ought to preclude a recovery if the action were in the name, as well as for the benefit, of the persons beneficially interested. Hence, if the next of kin suing to recover for the death of their relative, caused by the negligence of another, were themselves in fault, or, in other words, were guilty of contributory negligence which would bar their recovery if the action were in their names, it should equally bar a recovery when the action, though not prosecuted in their names, is maintained solely for their benefit, and more especially if the construction of the statute prevailing in the state is that the action is for the wrong done to, or injury suffered by, such beneficiary. The contrary to this is asserted in *Norfolk etc. R. R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. 454; *Wymore v. Mahaska County*, 78 Iowa, 396, 16 Am. St. Rep. 449, 43 N. W. 264; but, of course, upon the theory that the cause of action was one in favor of the decedent and for the injury done to him. This question was well considered in *Wolf v. Lake Erie etc. Ry. Co.*, 55 Ohio St. 517, 45 N. E. 708; *Bamberger v. Citizens' St. Ry. Co.*, 95 Tenn. 18, 49 Am. St. Rep. 909, 31 S. W. 163. It was there decided that the personal representative suing for the death of his decedent

was but a trustee of the persons beneficially interested in the recovery; that they were the real parties in interest; that the action was based upon injury done them; and finally that "the contributory negligence of the beneficiaries, who are to receive the damages and for whose benefit the action is brought in the name of the administrator, is clearly a defense to the action available to the person or corporation causing the injury."

STROBEL v. KERR SALT COMPANY.

[164 N. Y. 303, 58 N. E. 142.]

WATER AND WATERCOURSES—RIPARIAN RIGHTS.—

A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to the reasonable use of it as it passes by his land, and as all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law, *Aqua currit et debet currere, ut currere solebat*, still maintains.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—

Consumption of the waters of a natural stream by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by a reasonable use.

WATER AND WATERCOURSES—RIPARIAN RIGHTS—

REASONABLE USE.—Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances is held to be unreasonable. It is also material sometimes, to ascertain which party first erected his works and began to appropriate the water.

WATER AND WATERCOURSES—RIPARIAN RIGHTS—

REASONABLE USE—QUESTION OF FACT.—The question of reasonable use of the waters of a natural stream is generally one of fact, but whether the undisputed facts and the necessary inference therefrom establish a reasonable use is a question of law.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—NEW USE—POLLUTION.—If the diversion or pollution of the waters of a stream is caused by a new and extraordinary method of using the water hitherto unknown in the state, and such method not only permanently diverts a large quantity of water, but also renders the remainder so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted, such use as a matter of law is unreasonable, and entitles the lower riparian owner to relief.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—UNREASONABLE USE—INJUNCTION.—If the natural and necessary result of the place selected and the method adopted by an upper riparian owner in the use of the water of a stream in the conduct of his business is to cause material injury to the property of the owner below, a court of equity may restrain such use on account of the inadequacy of the remedy at law, and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of an upper owner's business.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—NEW USE—UNREASONABLE USE—POLLUTION.—Courts will not permit substantial injury to neighboring property with a small but long-established business on a natural stream, for the purpose of enabling a new and great industry thereon to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the rule that every man must so use his own property as not to injure that of his neighbor, the fact that he has invested much money and employs many men in carrying on a lawful and useful business on his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower proprietor, or to so pollute the stream as to render it unfit for ordinary use.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—POLLUTION OF STREAM—INJUNCTION.—If one riparian owner by his use pollutes the water of a natural stream, the fact that others are using it in the same manner, instead of preventing relief may require it, and, even if the damages are slight, if the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity may interfere by injunction.

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—INJURY COMMON TO CO-OWNERS.—Separate owners of distinct parcels of land upon a stream have a common grievance against a person for an injury to the stream of the same kind, inflicted at the same time and by the same acts, and such common injury, though differing in degree as to each owner, makes a common interest, and warrants a common remedy.

WATER AND WATERCOURSES—INJUNCTION AGAINST UNREASONABLE USE.—A court of equity may require, as a condition of withholding an injunction against an upper riparian owner from diverting or polluting the water of a stream by an entirely new use thereof, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the new use, and the court may also require, on like condition, greater care in preventing the escape of foreign substances into the stream, and thus prevent or minimize the pollution thereof.

H. S. Bacon, for the appellants.

N. Morey, for the respondent.

312 VANN, J. As the findings of the trial court are general and somewhat indefinite, construction is necessary by reading them in the light both of the uncontradicted evidence and of the evidence most favorable to the defendant. When, for instance, the learned trial judge found no diversion of the water and no use of it except in making salt upon the defendant's own lands, he did not find that there was no diversion or pollution, and, if he had, it would have been an error of law, because opposed to the uncontradicted evidence, and open to review by us because the affirmance was not unanimous. So, when he found that the use of the water by the defendant was proper, necessary, and reasonable, and such as it was lawfully entitled to make and not prejudicial to the rights of the plaintiffs, it was to some extent a conclusion of law, and, in so far as it was a finding of fact, so general as to require construction through the aid of other facts, either found or uncontradicted. **313** The same is true of the finding that the defendant has not unlawfully diverted or polluted the waters of said stream to the injury or prejudice of the plaintiffs, for as there was manifestly some diversion and some pollution, with some injury and some prejudice, the finding is either against the uncontradicted evidence or simply reflects the opinion of the trial judge that the degree of diminution, pollution, and injury was not so substantial as to require action by a court of equity. While the trial judge found that, owing to the hills bounding the valley, the vapor caused by evaporating salt on so large a scale, "as it condenses into water, naturally returns to said stream," he did not and could not find that it all so returned, or state the proportion that escaped. It was impossible for any witness to testify what part of the vapor rising in a narrow valley about two miles wide from summit to summit with comparatively low hills on either side, was carried away and dissipated by the wind, and what part returned to the earth, within the limits of the valley, in the form of mist or rain. The witnesses could not tell from observation, nor state as a fact, where such an invisible, elastic, and elusive substance went. There was no evidence of an increase in the rain or moisture. In cold weather, when the water is high, condensation would be rapid, but in warm weather, when the water is scarce, condensation would be slow. Some of the settling

tanks are on the hillside, half a mile from the stream. The measurements made below the works included the return by condensation, and there was no evidence to justify the conclusion that all the water diverted reached the stream again: *Hudson v. Rome etc. R. R. Co.*, 145 N. Y. 408, 412, 40 N. E. 8. The counsel for the defendant states in his points that "it is a very moderate estimate to say that at least two-thirds of the escaping steam, on the average, must be condensed and returned to the water supply of Oatka creek."

The theory upon which the trial judge proceeded to judgment is illustrated in his opinion, where he says: "The question is, whether it is a reasonable use of the stream to allow the water impregnated with salt to take its natural course into the ³¹⁴ stream, impairing its use for drinking purposes, or otherwise affecting its use by the lower proprietors to their injury." Discussing the question he further said: "Since the salt is a component part of the soil itself, and the owner has a legal right to excavate it and place it upon the surface, it would be an unwarrantable stretch of the powers of a court of equity to compel its removal, merely upon the ground that the surface water, becoming impregnated with the salt, and taking its natural course into a stream, renders its waters unsuitable for drinking purposes, or causes injury to the boilers and machinery of a mill situated far down on the banks of the stream. . . . The defendant, as a riparian owner, has a right to the natural and necessary drainage of any salt water which may escape from the salt works into the stream. The water used was returned to the stream in as clear and pure a condition as the nature of the operations upon the lands would permit. The only obligation resting upon the defendant is to exercise ordinary care so as not to inflict unnecessary injury to the lower proprietors."

Referring to the case of *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117, which followed the *Sanderson* case, hereinafter alluded to, he quoted with apparent approval the following therefrom: "Where a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected; and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation. It

is then a case in which the interest and convenience of the individual must give way to the general good."

Thus the trial judge was of the opinion that the plaintiffs, although they and their predecessors had used the waters of the stream in their mills and on their farms for half a century, could not prevent the defendant, which long afterward and with knowledge of the facts established its plant, from devoting ³¹⁵ the stream to a new and unusual use, diverting the water and turning "a fresh water stream into a salt water stream." This would amount to a virtual confiscation of the property of small owners in the interest of a strong combination of capital.

The use made by the defendant of the water of the stream is new and peculiar, for it involves its utter destruction as water. Until it is turned into vapor it refuses to give up its salt, so that it must cease to be water or fail to accomplish the defendant's purpose. That purpose is to utilize only by destroying, not in a scientific sense of course, but in a practical sense. The loss is not incidental by diminution through the process of using the water, as in most cases presented to the courts, but is absolute by means of dissipation through the atmosphere. The diversion is as complete as if the water had been pumped over the hills bordering the Oatka valley and turned into another creek, for diversion, as applied to water-courses, means taking water from a stream and not returning it, so that the lower riparian owner can use it: *Parker v. Griswold*, 17 Conn. 288, 289, 42 Am. Dec. 739. By taking nearly one hundred and fifty gallons every minute during a working day of ten hours, the defendant diverted that quantity of water from its natural course. The evidence, practically undisputed, shows that the water of the stream, which was fresh before the erection of the defendant's works, is now salt, especially in a dry time. The witnesses who tested it agree that it "tastes salt," and the effect of salt in the water was obvious to the senses in various ways, as by small stalactites of salt formed at leaky spots in the pipes of machinery, the formation of visible crystals on stones in the stream, the rusting of machinery, the foaming of water in the boilers, and the destruction of vegetation. The owners of portable steam-engines, who formerly used the water in their boilers, abandoned it and resorted to rain or well water. Wells near the stream were affected to some extent. In some places the salt killed vegetation, including willow trees; it destroyed fish in large numbers; cattle and horses refused to drink the water, although some drank it when they

had nothing ³¹⁶ else to drink. One of the plaintiffs boiled three quarts of water taken from the race leading to his mill and obtained nearly a tablespoonful of salt; another could grind only about half as much grain as he had previously ground at the same season of the year.

All this evidence and other of like character stands substantially uncontradicted, as it is not a contradiction for a witness to say that he did not observe these effects, when he did not examine in order to see what the facts were. The only dispute was in relation to the degree of pollution, and the defendant's evidence is substantially adopted for the purpose of this review. One of its experts, who for twenty years was the state chemist at the Onondaga Salt Springs, testified that in a sample taken in December, 1892, above the works, he found in a gallon of water eighty-six thousandths grains of salt, while a specimen taken right below the works contained three hundred and five and one hundredths grains. A specimen taken at the mill of the plaintiff Munger, which is a mile and one-half below the defendant's works, and is above all the other salt plants, afforded ninety-nine and eight hundredths grains, one from the mill of the plaintiff Martin, about two miles below, seventy-five and sixty-nine hundredths, another from Brown's pond, still farther down the stream, eighty-two and fourteen hundredths. These samples were taken by the chemist himself, and, except that last mentioned, were unaffected by any other source of pollution than the defendant's works. Thirty-three other specimens, obtained in April, 1893, still farther down the stream, after many small rivulets, as well as the drainage from other salt works, had emptied in, but not taken by the chemist himself, showed much less salt to the gallon, and averaged between thirty and forty grains, only two of them exceeding fifty. An analysis made by the plaintiff's chemist of forty-four specimens, taken by a hydraulic engineer in September, October, and November, 1892, at points from one-half to one mile apart, all along the stream below defendant's works, showed a much larger proportion of salt, averaging, even after rejecting eleven of the highest, which went up into the thousands, from one hundred to three hundred grains to the gallon. The samples of the plaintiffs were taken from the stream after the commencement ³¹⁷ of the action and before the trial, while the defendant's were taken shortly before or during the trial and after the changes had been made in order to prevent the salt water from reaching the creek. While all water contains some

salt, that which contains less than fifty grains to the gallon is, according to the testimony of defendant's expert, suitable for use in steam boilers. Brine of full strength contains eighteen thousand and seventy-two grains to the gallon.

The testimony as to the amount of diminution is less definite and satisfactory than that relating to pollution, owing to the difficulty of measuring water flowing in a stream. It is undisputed, however, that the water diverted, as measured by defendant's expert, by "four independent but simultaneous methods," including "weir measurement," which embraced all water returned to the stream, if used by the plaintiffs to the best possible advantage, would be equal to nine horse-power daily. One year it amounted to four per cent of the flow at plaintiff Munger's mill during the whole month of July. The uncontradicted evidence and the evidence most favorable to the defendant shows such a degree of pollution, and such an amount of diminution, as to make it certain, in our judgment, that the trial judge in his findings meant that neither was in excess of what the defendant had a lawful right to put in or take out of the stream in conducting a lawful business upon its own premises. This theory is confirmed by his opinion, as he relies largely upon a case in Pennsylvania, which held that one operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water that percolates into his mine into a stream which forms the natural drainage basin in which the mine is situate, although the quantity of water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners: *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, 6 Atl. 453. That case had a varied history, and it was not until it came before the court for the fourth time that, influenced by the necessities of a great industry, the rule was laid down as stated. The case was first considered in ³¹⁸ 1878, when the claim of the lower riparian owner was sustained upon the principle of *sic utere tuo ut alienum non laedas*. In reply to the argument of counsel that "the law must be adjusted to our great industrial interests," the court said: "In the argument here the ground was distinctly taken that immense public and private interests demand that the right which the defendants exercised in ejecting the water from their mine should have recognition and be established. It was said that in more than a thousand collieries in the anthracite regions of the state the mining of coal can only be carried on by pumping out the perco-

lating water which accumulates in every tunnel, slope, and shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run. . . . The consequences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time, when, under the operations of even a single colliery, a whole countryside would be depopulated." In 1880 the case was reviewed a second time, and it was again urged that the rights of the riparian owners should yield to the immense public interest involved. The court, however, reaffirmed its former decision, and among other things said: "The mining operations of the defendant do not involve the public welfare, but are conducted solely for the purposes of private gain. Incidentally, all lawful industries result in the general good; they are, however, not the less instituted and
319 conducted for private gain, and are used and enjoyed as private rights over which the public has no control. It follows that none of them, however important, can justly claim the right to take and use the property of the citizen without compensation": *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. St. 302, 307, 39 Am. Rep. 785. In 1883 the court heard the case for the third time, with the same result, but on the last review in 1886, by a vote of four to three, it reversed its previous decisions and held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal." The extensive coal mines of the state of Penn-

sylvania were regarded as of sufficient importance to warrant the court in departing from the law as previously laid down by itself in the same case, as well as from the rule which prevails in England and in this country, except in some of the states where mining is extensively carried on and there is no way to get rid of the water in the mines except by pumping it into the streams: *Clifton Iron Co. v. Dye*, 87 Ala. 470, 6 South. 192. Courts of the highest standing have refused to follow the *Sanderson* case: *Columbus etc. Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630; *Beach v. Sterling Iron etc. Co.*, 54 N. J. Eq. 65, 33 Atl. 286; *Young v. Bankier Dist. Co.*, [1893] App. Cas. 691; and its doctrine was finally limited by the court which announced it: *Robb v. Carnegie*, 145 Pa. St. 338, 27 Am. St. Rep. 694, 22 Atl. 649. The court below, however, manifestly followed the Pennsylvania rule without limitation: *Mann v. Retsof Min. Co.*, 49 App. Div. 454, 459, 63 N. Y. Supp. 752. We have never adopted that rule in this state, and no public necessity exists therefor, even if it would ever warrant the courts in relaxing rules for the protection of property of small value in the interest of some business required to develop the resources of the state,³²⁰ and in which much capital had embarked, giving employment to a great number of people.

There is nothing about the case now before us to take it out of the general rules governing the rights of riparian owners. Those rules are well established in this state, and, so far as material to the case before us, are, in the absence of modification by grant or prescription, as follows: A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat*. Con-

sumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain ³²¹ circumstances, is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water: *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841; *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787; *Prentice v. Geiger*, 74 N. Y. 341; *Bullard v. Saratoga etc. Mfg. Co.*, 77 N. Y. 525; *Merritt v. Brinkerhoff*, 17 Johns. 306, 8 Am. Dec. 404; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Arnold v. Foot*, 12 Wend. 330; *Tyler v. Wilkinson*, 4 Mason, 397; *Columbus etc. Coal Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630; *Beach v. Sterling Iron etc. Co.*, 54 N. J. Eq. 65, 33 Atl. 286; *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279; L. R. 2 Ch. App. 478; *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; *Attorney General v. Lunatic Asylum*, L. R. 4 Ch. App. 146; *Hodgkinson v. Ennor*, 4 Best & S. 229; 3 Kent's Commentaries, 439; Gould on Waters, sec. 219; Higgins on Watercourses, 132; Washburn on Easements, 4th ed., 215; 1 Wood on Nuisances, secs. 364, 427.

The question of reasonable use is generally a question of fact, but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use is a question of law. When the diversion, or pollution, which is treated as a form of diversion, is caused by a new and extraordinary method of using the water, hitherto unknown in the state, and such method not only permanently diverts a large quantity of water from the stream, but also renders the rest so salt, at times, that cattle

will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed and machinery rusted, such use, as a matter of law, is unreasonable and entitles the lower riparian owner to relief. Where the natural and necessary result of the place selected, and the method adopted by an upper riparian owner in the conduct of his business is to cause material injury to the property of an owner below, a court of equity will exercise its power to restrain on account of the inadequacy of the remedy at law and in order to prevent a multiplicity of suits. The ³²² lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of the defendant's business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both": *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657. While the courts will not overlook the needs of important manufacturing interests nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use.

The fact that other salt manufacturers are doing the same thing as the defendant, instead of preventing relief, may require it. "Where there is a large number of persons mining on a small stream, if each should deteriorate the water a little, although the injury from the act of one might be small, the combined result of the acts of all might render the water utterly unfit for further use; and if each could successfully defend an action on the ground that this act alone did not materially affect the water the prior appropriator might be deprived of its use, and at the same time be without a remedy": *Hill v. Smith*, 32 Cal. 166; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Sherman v. Fall River Iron Works Co.*, 5 Allen, 213; *Mayor etc. v. Warren Mfg. Co.*, 59 Md. 96; *Crossley v. Lightowler*, L. R. 3

Eq. Cas. 279; 2 Ch. App. Cas. 478; Pennington v. Brinsop Hall Coal Co., L. R. 5 Ch. Div. 769, 772.

323 In *Garwood v. New York R. R. Co.*, 116 N. Y. 649, 22 N. E. 396, the diversion, as shown by the record on file in this court, was less than that testified to by the defendant's witnesses in the case before us. Even if the damages are slight, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction: *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 280, 56 N. E. 757.

The objection that the plaintiffs have no cause of action common to all, and hence that they cannot sue jointly, is unsound. While each owns a distinct piece of land situated upon a part of the stream separate from that abutted upon by the land of every other owner, they all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts. The common injury, although differing in degree as to each owner, makes a common interest and warrants a common remedy: *Emery v. Erskine*, 66 Barb. 9, 14; *Reid v. Gifford*, Hopk. Ch. 416; *Murray v. Hay*, 1 Barb. Ch. 59, 62, 43 Am. Dec. 773; *Blunt v. Hay*, 4 Sand. Ch. 362.

It does not follow from these views that, if upon another trial the facts are unchanged, the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity, with its plastic powers, can require, as a condition of withholding a permanent injunction, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.

The judgment of the courts below should be reversed and a new trial granted, with costs to abide the event.

Parker, C. J., O'Brien, Bartlett, Landon, Cullen, and Werner, JJ., concur.

WATERS, REASONABLE USE OF.—A riparian proprietor is entitled to have a stream flow over his land in the natural channel, undiminished in quantity and unimpaired in quality, except so far as diminution or contamination is inseparable from a reasonable use of such water: *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757. He is entitled to a reasonable use of the

stream. Whether a use is reasonable depends upon the circumstances of each case: *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393; and is a question of fact for the jury: *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154. The rights of each riparian owner are subject to the limitation that others may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes: *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495; *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167. It is not under all circumstances an unlawful or unreasonable use of a stream to throw or discharge into it waste or impure matter: *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117.

WATERS, POLLUTION OF.—An injunction will lie to restrain the pollution of a stream: *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88; as where a mill owner, in an unreasonable manner, discharges the waste of his mill therein: *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331.

WATERS, FURTHER POLLUTION OF.—The fact that a water-course is already polluted does not entitle other persons to add thereto, or preclude persons through whose lands it flows from obtaining relief by injunction against its further pollution: *Barrett v. Mt. Greenwood etc. Assn.*, 159 Ill. 385, 50 Am. St. Rep. 168, 42 N. E. 891; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167.

CUMMINGS v. UNION BLUE STONE COMPANY.

[164 N. Y. 401, 58 N. E. 525.]

CONTRACTS TENDING TO CREATE MONOPOLIES.—Contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and void.

CONTRACTS TENDING TO CREATE MONOPOLIES.—An agreement between the producers of nearly the whole product of a commercial commodity, and a company engaging to sell all of such marketable commodity produced by them for a term of years at prices fixed by them, to apportion the sales between such producers and no sales to be made except through such company, tends to create a monopoly, and is void as against public policy.

L. Leo and B. Yates, for the appellant.

A. T. Clearwater and J. F. Cloonan, for the respondents.

⁴⁰² **LANDON, J.** The trial court, in directing a verdict for the defendants, held that the contract, for the alleged violation of which by the defendants the plaintiff sought to recover damages, was a combination to control the market of blue stone and the market price, and to increase the market price and maintain it at the increased price, and was, therefore, void.

The evidence was to the effect that in 1887 the plaintiff and fourteen other persons were the producers of nearly the whole ⁴⁰³ product of Hudson river blue stone, and of at least ninety per centum of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi river; that their yearly sales amounted to upward of one million five hundred thousand dollars; that owing to competition among themselves their profits had for some time been practically nominal; that with the intent to increase their profits, and to secure to each of said producers such part of the sales as his usual production bore to the whole production, they entered into an agreement bearing date the twenty-first day of February, 1887, with the defendant the Union Blue Stone Company, and thereby agreed that the said company should act as their sales agent of all the marketable blue stone, manufactured and unmanufactured, which the market would take for the six years from that date at prices to be fixed by the Blue Stone Association, composed of the said producers, and to apportion the sales among the producers according to a schedule set forth in the contract, and to sell for no other parties, the producers agreeing to sell no stone except through such agent, and, acting as the Blue Stone Association, to fix the prices, and each to furnish, upon the request of the sales agent, his quota of stone as apportioned. This contract was observed by the parties for about three years. The prices were increased, the sales aggregated about one million five hundred thousand dollars per year, and the plaintiff's share of the profits was satisfactory to him. By the end of three years competition in other kinds of stone and in artificial stone had so far developed as to threaten, in the opinion of the greater part of the producers, not including the plaintiff, further successful operation under the contract, and they resolved to discontinue operations under it, with the result to the plaintiff that he took no further benefit under it. The plaintiff, meantime, had assigned his interest under the contract and certain blue stone and other property to the defendants Sweeney in consideration of their payment to him of ten per centum of their gross amount of sales under the contract. The plaintiff charges that the blue stone company and his assignees, the Sweeneys, combined together to ⁴⁰⁴ prevent any further delivery and sales upon his account under the contract, and thus deprived him of any further profit.

The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply

to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear, and, as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts do anything to injure what he sells: *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363; *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. Rep. 475, 28 N. E. 469; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335. It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel anyone to continue a business which he can sell or finds it to his interest to abandon, much less to continue it for any time or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price. The ⁴⁰⁵ same evil principle pervades both large and small combinations; all are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void: *People v. Sheldon*, 139 N. Y. 251, 36 Am. St. Rep. 690, 34 N. E. 785; *People v. Milk Exchange*, 145 N. Y. 267, 45 Am. St. Rep. 609, 39 N. E. 1062; *Judd v. Harring-*

ton, 139 N. Y. 105, 34 N. E. 790; Leonard v. Poole, 114 N. Y. 371, 11 Am. St. Rep. 667, 21 N. E. 707; Arnot v. Pittston etc. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; People v. Fisher, 14 Wend. 9, 28 Am. Dec. 501.

It is urged that the rule is only applicable to articles of prime necessity. Cases of criminal conspiracies to commit any act "injurious to trade or commerce" (Pen. Code, sec. 168; 2 Rev. Stats., sec. 8, subd. 6, p. 692) have been more frequent in commodities of prime necessity such as grain, meat, salt, milk, coal, and the like, probably because such offenses are more flagrant and were punishable at the common law. We are not now reviewing a conviction for crime and need not inquire whether in any criminal element the case differs from *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785. The subject matter of the contract before us is a useful commodity of a nature to be needful for many purposes. Without considering the question whether there are many articles of commerce which are in no proper sense necessities or even conveniences, but mere luxuries or appendages of vanity, a monopoly in which does not conflict with the spirit of any statute or with the sound public policy which the statute cited declares, it is clear that the blue stone in question is not within any of such classes. It is abundant in the foothills of the Catskill mountains and not found of equal quality elsewhere. When this contract was made there were many small producers who supplied it to these parties, but were themselves without means or facilities to reach the New York market. The stone had been for many years and still is in use for sidewalks, crossings, curbings, and gutters in the eastern and southern cities of the United States, and in ⁴⁰⁶ the construction of bridges, fountains, basins, floors, and for trimmings in the exterior walls of buildings and for various other purposes. Its fitness and serviceability for these purposes were shown, and the evidence also tended to show that in these respects it had no superior in the New York market. In a civil action prime necessity need not be shown. The parties to this contract controlled ninety per centum of a total product of about two million dollars in value, marketed in New York city. Other kinds of stone were in competition with it, but it is plain that the customer who preferred this stone would be restricted in his reasonable rights, if constrained by a monopoly to pay an exorbi-

tant price for it, or to accept another kind which he did not want.

The uncontradicted evidence left it clear that this contract was void for the reasons stated, and the trial court was right in so holding as a matter of law. The trial court was also right in holding that the plaintiff had made no proof of his special charge against these defendants of a fraudulent breach of the contract as to his alleged interest in it.

The judgments should be affirmed, with separate bills of costs.

Gray, O'Brien, Haight, and Werner, JJ., concur.

Parker, C. J., and Cullen, J., not sitting.

TRUSTS AND MONOPOLIES are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. Combinations formed for the purpose of stifling competition in trade are against public policy and illegal: *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274.

ROCHESTER v. WEST.

[164 N. Y. 510, 58 N. E. 673.]

MUNICIPAL CORPORATIONS—ORDINANCE REGULATING ERECTION OF BILLBOARDS.—A municipal ordinance prohibiting the erection of billboards exceeding six feet in height, within the city limits, except with the permission of the common council, is authorized by a charter conferring power upon the city "to license and regulate billposters, and to prescribe the terms and conditions upon which any license shall be granted."

CONSTITUTIONAL LAW—REGULATION OF HEIGHT OF BILLBOARDS.—A statute conferring upon the common council of a city authority to regulate the height of boards erected for the purpose of billposting, so far, at least, as such regulation is necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets, is valid and constitutional.

CONSTITUTIONAL LAW—VALIDITY OF STATUTES AND ORDINANCES is not to be determined from their effect in a particular case, but upon their general purpose and their efficiency to effect that end, and when a statute is obviously intended to provide for the safety of the community, and an ordinance passed under it is reasonable and in compliance with its purpose, both the statute and the ordinance are valid and constitutional, and must be sustained.

MUNICIPAL CORPORATIONS—ORDINANCES LIMITING HEIGHT OF BILLBOARDS.—A city ordinance prohibiting the erection of billboards more than six feet high within the city lim-

its, without the consent of the common council, is not unreasonable, or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property.

J. R. Fanning, for the appellant.

P. M. French, for the respondent.

513 MARTIN, J. Whether this appeal should be sustained depends wholly upon the validity or invalidity of an ordinance of the plaintiff which forbids the erection, within its limits, of billboards more than six feet in height without the consent of the common council. By its charter the plaintiff was authorized "to license and regulate billposters and bill distributors and sign advertising, and to prescribe the terms and conditions upon which any such license shall be granted, and to prohibit all unlicensed persons from acting in such capacity": Laws 1880, c. 14, sec. 40, subd. 21; as amended, Laws 1894, c. 28, sec. 9. We think this statute conferred upon the common council of the city authority to regulate boards erected for the purpose of billposting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets. That is precisely what the ordinance in question was intended to accomplish. To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted: *Cronin v. People*, 82 N. Y. 318, 321, 37 Am. Rep. 564.

Nor do we think that the applicant's claim that this statute **514** was unauthorized can be sustained. It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them. That the legislature had power to pass a statute authorizing the city to adopt an ordinance which, if enforced, would obviate that danger, we have no doubt. Nor was it in conflict with any provision of the state or federal constitution. The fact that no injury has occurred by reason of the erection of the billboard in question, or that it is improbable that any such injury will occur therefrom, is not controlling upon the question under consideration. The validity of a stat-

ute is not to be determined by what has been done in any particular instance, but by what may be done under it: *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Gilman v. Tucker*, 128 N. Y. 190, 200, 26 Am. St. Rep. 464, 28 N. E. 1040. It is equally true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained: *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, 25 N. E. 480; *People v. Pratt*, 129 N. Y. 68, 29 N. E. 7; *Mayor etc. v. Dry Dock etc. R. R. Co.*, 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; *Rochester v. Simpson*, 134 N. Y. 414, 31 N. E. 871; *People v. Havnor*, 149 N. Y. 195, 204, 52 Am. St. Rep. 707, 43 N. E. 541.

We are of the opinion that this ordinance is reasonable; that the legislature authorized its adoption; that the statute in pursuance of which it was passed was valid, and, consequently, that the defendant's appeal cannot be sustained.

It follows that the judgment appealed from should be affirmed. The questions certified to this court are answered as follows:

515 1. The common council of the city of Rochester had authority, under its charter, to pass the ordinance under consideration.

2. The ordinance in question is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property.

O'Brien, Bartlett, Haight, Vann, and Landon, JJ., concur.

Parker, C. J., not sitting.

BILLBOARDS.—AN ORDINANCE providing that no billboard shall be erected unless it is "placed at such distance from the line of any street or sidewalk as shall exceed at least five feet the height of such billboard," and prescribing a punishment for its violation, is unreasonable and void: *Crawford v. Topeka*, 51 Kan. 756, 37 Am. St. Rep. 323, 33 Pac. 476.

BRADT v. KRANK.

[164 N. Y. 515, 58 N. E. 657.]

NEGOTIABLE INSTRUMENTS—AGREEMENT TO PAY DEBT OF THIRD PERSON, WHETHER A NOTE.—A written agreement by one person to pay another a certain sum due from a third person on or before a certain day is not a promissory note importing a consideration, and to sustain a judgment based thereon, a consideration must be proved to exist.

R. J. Cooper and F. Cooper, for the appellants.

J. A. Delehanty, for the respondents.

517 BARTLETT, J. The cause of action alleged in the complaint is this, in substance: That the plaintiffs were copartners, doing business in Albany, and certain persons, not parties to this action, were partners in trade at Schenectady, under the firm name of Church & Jones; that Church & Jones were indebted to plaintiffs in the sum of two hundred and sixty-five dollars and fifty cents for ⁵¹⁸ goods sold and delivered; that plaintiffs sued the claim and were entitled to enter judgment; that defendants, for the purpose of inducing them to withdraw the suit and extend time of payment, made and subscribed a memorandum in writing, whereby they promised and agreed to pay said indebtedness by a day named; that plaintiffs did, in pursuance of the agreement, discontinue suit and extend the time of payment until a day named and duly performed the agreement on their part; that payment was demanded and refused.

The answer denied, on information and belief, the following: The indebtedness of Church & Jones to plaintiffs as alleged; the pending suit and the right to enter judgment; the averment that in conformity with the written memorandum the plaintiffs discontinued action and extended time of payment. It is claimed by plaintiffs that the fifth subdivision of the complaint is not denied, which alleges the execution of the memorandum in writing to induce discontinuance of suit and extension of time to pay the indebtedness.

This claimed omission of the answer seems to be well founded, but the admission, standing by itself and taken in connection with the denial of the other material allegations of the complaint, is of no importance.

With the issues thus framed the plaintiff's counsel produced at the trial the memorandum in writing referred to, but not set forth in the complaint, and which reads as follows:

"Schenectady, N. Y., Aug. 11, 1897.

"We, the undersigned, John Krank and John L. Mynderse, hereby agree to pay David Bradt, Becker & Co. a bill of two hundred and sixty-five dollars and fifty cents (\$265.50) against Church & Jones between now and Tuesday next.

"(Signed) JOHN KRANK.

"JOHN L. MYNDERSE."

The plaintiff's counsel, ignoring the complaint, assumed this written instrument to be a promissory note importing a consideration and rested his case after proving the following facts: The partnership of the plaintiffs; that the defendants resided in Schenectady; the signatures of the defendants to the writing ⁵¹⁹ produced; amount of interest due, demand of payment, and putting the written memorandum in evidence.

The defendants offered no evidence, but moved for a nonsuit on the following grounds: "That the evidence shows that the alleged promise on the part of the defendants was to pay the debt of a third party; that the written memorandum in evidence is insufficient under the statute of frauds; that it is not either an agreement or a memorandum of agreement; that it is without consideration so far as it appears on the instrument itself; that it is simply a naked promise which is void in law; that it contains nothing to show what the plaintiffs were to do, if anything, on their part of the contract; in other words, that it is a one-sided contract." This motion was denied, and the defendants excepted.

Both counsel moved for a directed verdict. The trial judge stated that on the authority of *Hegeman v. Moon*, 131 N. Y. 463, 30 N. E. 487, he denied the defendant's motion and granted that of the plaintiffs. The defendants' counsel excepted to both rulings.

It is urged on behalf of defendants that the plaintiffs made no attempt to prove the cause of action set forth in the complaint; that they sued upon a conditional promise of defendants to pay the debt of Church & Jones, and sought by their proofs to change the action into a suit on a promissory note, and that a judgment entered under such a state of the record cannot be sustained on appeal. This objection, if taken at the trial, would be fatal to a recovery: *Southwick v. First Nat. Bank*, 84 N. Y. 420; *Truesdell v. Sarles*, 104 N. Y. 167, 10 N. E. 139; *Romeyn v. Sickles*, 108 N. Y. 650, 15 N. E. 698.

No judgment can be given on grounds not stated in the complaint; the judgment shall be "*secundum allegata et probata*." No such objection, however, was taken at the trial. It is now argued that the point was raised on the motion to nonsuit, but the record does not sustain this contention.

We will first consider the question whether the instrument in writing, not set forth in the complaint but proved at the trial, is a promissory note.

⁵²⁰ The trial judge felt constrained by the case of *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487, to hold that it was. The written instrument under construction in that case reads in its material parts as follows, viz.:

"One year after my death I hereby direct my executors to pay to Joseph Hegeman . . . the sum of . . . being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day, without interest.

"CORNELIA W. HEGEMAN."

Joseph Hegeman sued the executors of Cornelia W. Hegeman on this instrument. It was held by this court that the statement in the written instrument that a certain amount was due plaintiff carried with it the implication that it was due from the maker; that the acknowledgment of the indebtedness and that it is due implies a promise to pay it on demand, in absence of other directions. It was further decided that this writing was a promissory note, imported a consideration, and was valid notwithstanding it was payable after the death of the maker. No point raised in *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487, is presented in the case at bar save the general contention that the written instrument is a promissory note.

We are also cited to *Carnwright v. Gray*, 127 N. Y. 92, 24 Am. St. Rep. 424, 27 N. E. 835, as a case in point. The second division, with a divided court, held the following instrument to be a promissory note:

"Thirty days after death I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest."

This decision has no bearing on the case we are considering. The written instrument before us needs no construction, as the language employed is clear; the defendants promise the plaintiffs to pay a debt due them from Church & Jones on or before a day named.

The trial judge erred when he held this writing to be a promissory note, importing a consideration. No consideration

521 was proved for the written instrument, and a judgment based thereon cannot be sustained. The plaintiffs should have proved the cause of action alleged in their complaint, the allegations of which were denied.

If they had proved the indebtedness of Church & Jones to them, their action on the claim and the right to enter judgment, and that in pursuance of an agreement made with defendants they discontinued the action and extended the time of payment, they would have been in a position to have claimed that the consideration moving between them and the debtors was sufficient to sustain the written promise of defendants as a special promise to answer for the debt, default, or miscarriage of another person under the statute of frauds.

While it is true that since that statute was amended in 1863, the agreement, or the note or memorandum thereof, need not express the consideration (2 Rev. Stats. 135, sec. 2, as amended by 2 Rev. Stats., Banks' 9th ed., 1886), yet the consideration must exist and be proved before recovery.

The point whether this written instrument, aside from the question of consideration, is in its terms a sufficient compliance with the statute of frauds, requiring the agreement to answer for the debt of another to be in writing and subscribed by the party to be charged therewith, is not now presented and we do not pass upon it. It is doubtless true, as suggested by counsel for appellants, that the written instrument does not contain the terms of the contract as set forth in the complaint, but as the case was tried upon a wrong theory which ignored the complaint, the question of the sufficiency of the writing under the statute of frauds must await a proper trial of the issues as framed.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

Parker, C. J., O'Brien, Haight, and Vann, JJ., concur.

Martin and Landon, JJ., not sitting.

NOTE—CONSIDERATION.—IF A THIRD PARTY, without any consideration personal to himself, gives his promissory note to a creditor as collateral to the mere naked debt of another, without any circumstance of advantage to the debtor or disadvantage to the creditor, the note is without consideration: *Turle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475, 65 N. W. 349.

CONTRACTS FOR THE BENEFIT OF THIRD PERSONS are considered in the monographic note to *Baxter v. Camp*, 71 Am. St. Rep. 176-207.

FORBELL v. NEW YORK.

[164 N. Y. 522, 58 N. E. 644.]

WATERS AND WATERCOURSES—DIVERSION OF SUB-SURFACE WATER.—A municipal corporation or individual who by means of wells and pumps on his own land taps the subsurface water stored in the land of an adjoining owner, and in all of the region thereabout, and leads it to his own land and by merchandising it prevents its return, to the injury of such adjacent land, is guilty of a trespass, and liable therefor in damages.

J. Whalen, corporation counsel, and W. J. Carr, for the appellant.

C. C. Miller, for the respondent.

523 LANDON, J. The defendant makes merchandise of the large quantities of water which it draws from the wells that it has **524** sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land is thereby affected, but does complain and the courts below have found that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown.

The defendant does not take from his own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation and course of the subsurface waters are unobservable from the surface, they are unknown and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters.

That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have in the just administration of the law a remedy.

In *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would ⁵²⁵ have been liable if it had simply lowered the subsurface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability: *Ellis v. Duncan*, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Phelps v. Nowlen*, 72 N. Y. 40, 28 Am. Rep. 93; *Bloodgood v. Ayers*, 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Van Wycklen v. Brooklyn*, 118 N. Y. 424, 24 N. E. 179.

The earlier cases followed the law as stated in *Acton v. Blundell*, 12 Mees. & W. 324, and *Greenleaf v. Francis*, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil so long as it remains there is—unlike water flowing in a surface stream—a part of the soil itself: *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; that a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing ⁵²⁶ that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

527 The distinction between a case like this and the cases of percolating waters in which liability has been denied was well pointed out by the learned judge who wrote for the appellate division in *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 144. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and watercresses of which the plaintiff's land was so productive before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

Parker, C. J., Bartlett, Haight, Martin, and Vann, JJ., concur.

O'Brien, J., not voting.

WATERS.—SUBTERRANEAN OR PERCOLATING waters and rights therein are treated in the monographic note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 663-672. Where a corporation was sinking a deep well on property adjoining that of the plaintiff, for the purpose of pumping water therefrom by machinery and supplying it to customers, it was enjoined from so doing on the plaintiff's showing that serious injury would thereby result to him in the use of his land: See the monographic note to *Wheatley v. Baugh*, 64 Am. Dec. 728.

DAVIS v. BLY.

[164 N. Y. 527, 58 N. E. 648.]

NEGOTIABLE INSTRUMENTS — INDORSEMENT BEFORE DELIVERY.—If a note is indorsed before its delivery to the payee at the request of the maker with knowledge on the part of the indorser that his name is required by the payee as a condition of making or procuring the loan, and as security for its payment, he is placed in the same condition in relation to the payee as though he indorsed the note by express agreement with him, and may be held liable as a first indorser.

C. C. Van Kirk, for the appellant.

F. A. Smith, for the respondent.

528 VANN, J. This action was brought upon a promissory note of which the following is a copy:

529 "\$200. Crown Point, N. Y., Oct. 1st, 1895.

"One year after date I promise to pay to the order of Truman E. Davis two hundred dollars at . . . value received with interest.

C. D. GAGE."

Indorsed: "Norman Bly."

The plaintiff, although payee of the note, sought to recover from Bly upon the allegation that the latter indorsed at the request of the maker for the purpose of giving him credit with the plaintiff, who, in reliance upon the indorsement, accepted the note and lent the maker two hundred dollars thereupon.

The defendant Bly alone answered, denying that he indorsed for the purpose of giving Gage credit, and alleging that his indorsement was to give the plaintiff credit and to enable him to get the note discounted. At the close of the evidence for the plaintiff the court granted a nonsuit, but the judgment entered accordingly was reversed by the appellate division, and the defendant Bly now comes here.

It appeared from the testimony of the plaintiff that at about the date of the note Gage, the maker, applied to him for a loan of two hundred dollars, stating that he would give him a note with a good backer if he would advance the money on it. The plaintiff told him that he had the money, and with a good backer he would let him have the amount he wanted. Gage thereupon said, "How will Mr. Bly be?" and the plaintiff replied, "Mr. Bly will be all right." The next day Gage delivered the note indorsed by Bly to the plaintiff, who, relying solely

upon said indorsement, let him have two hundred dollars upon it.

Gage was sworn as a witness for the plaintiff, and testified that at about the time the note was given he was owing the plaintiff for some fertilizer which he had purchased of him, and that the plaintiff had requested payment therefor. Gage told him that he had not the money, but wanted to borrow some to pay him and others, and inquired if the plaintiff knew where he could get a couple of hundred dollars. The plaintiff replied that a friend of his had some money in trust that he could get on a good note or security.

Gage then applied to Mr. Bly, who had been in the habit ⁵³⁰ of indorsing for him, and asked if he would indorse a note for him. Mr. Bly replied that he would rather Gage would get some one else. Shortly afterward Gage again saw Bly, who asked him if he had an indorser for the note, and Gage said no. Bly asked if he had the note with him, and thereupon Gage showed him the note and asked him if he would indorse it. Bly replied, "Yes, he would indorse that, as he considered Davis good enough and did not need any indorsement," and accordingly he indorsed it. During one of these conversations Gage told Bly that he had applied to another person to indorse the note, but he had refused. He also told Bly that the plaintiff had said he could get the money for him on the note or on a good note. All this occurred before Bly indorsed the note. Upon his cross-examination Gage testified: "I told Mr. Bly that Davis told me that he could get the money on a good note. Q. Did he say from whom he could get it? A. No, sir." On his redirect examination Gage testified: "Q. I understand you to say that Mr. Davis said in substance to you that he could get the money for you on a good note? [Objected to as already answered.] Q. But you told Mr. Bly what you have testified to as to the conversation between you and Mr. Davis; is that so? A. Yes, sir."

This is the substance of the testimony so far as it related to the principal issue. From this evidence the jury might have inferred that Bly knew that Gage was negotiating with the plaintiff for a loan; that the plaintiff required an indorser as a condition of making or procuring the loan; that Bly had loaned the credit of his name to Gage before by way of indorsement; that Bly knew that the plaintiff did not regard Gage as good; that Bly, however, regarded the plaintiff as good: that the note when shown to Bly was payable to the

order of the plaintiff, yet Gage told him that he had no indorser, but needed one, and finally that Bly indorsed the note to enable Gage to comply with plaintiff's requirement of a good indorser.

The statement of Bly that he would indorse, as he thought the plaintiff was good, is not conclusive upon the question of ⁵³¹ intent, for that remark, which may have been merely a self-serving declaration, is to be considered in connection with what Bly did and what he knew when he did it. Bly was not sworn, and the jury might have read between the lines of Gage's testimony that he was trying to take care of his indorser. The note was to run for a year and was not payable at any specified place, so that it could not have been used at a bank in the ordinary course of affairs. As was said by the court below, "No good reason appears in the case for the plaintiff wanting the indorsement of Bly if he himself expected to become the first indorser. The plaintiff, as Gage told Bly, wanted Gage to bring him a good note, not one that he could make good by himself becoming the first indorser."

Whether the plaintiff was to make the loan or procure it is of no importance, for, as we have held: "It is not necessary that the indorser should know the precise nature of the credit to be procured. It is sufficient that he knows that a credit is to be obtained of the payee": *Coulter v. Richmond*, 59 N. Y. 478, 483. If Bly indorsed with the knowledge that his name was required by the payee as a condition of making or procuring the loan, and as security for its payment, he was placed in the same condition in relation to the payee as though he had indorsed by express agreement with him: *Meyer v. Hibsher*, 47 N. Y. 265.

The plaintiff was entitled to the most favorable inferences warranted by the evidence, and, notwithstanding the presumption arising from the face of the note, the jury might have found that the appellant intended to become liable as first and not as second indorser: *Moore v. Cross*, 19 N. Y. 227, 75 Am. Dec. 326; *Jaffray v. Brown*, 74 N. Y. 393; *Witherow v. Slayback*, 158 N. Y. 649, 53 N. E. 681.

The judgment of the appellate division should be affirmed, and judgment absolute directed for the plaintiff under the defendant's stipulation, with costs in all courts.

O'Brien, Bartlett, Haight, and Martin, JJ., concur.

Parker, C. J., and Landon, J., not sitting.

ONE WHO INDORSES A NOTE BEFORE ITS DELIVERY to the payee is liable thereon as an indorser: See the monographic note to *Cadwallader v. Hirshfeld*, 72 Am. St. Rep. 682, on the effect of indorsement by a stranger before delivery.

OTTO v. VAN RIPER.

[164 N. Y. 536, 58 N. E. 643.]

GUARDIAN AND WARD—LIABILITY OF SURETIES.—If a deposit of money realized on a mortgage given by a guardian to indemnify his sureties is lost without his fault by the insolvency of the depositary, the sureties are still liable to make good the money misappropriated by the guardian in his official capacity, although the deposit of such mortgage money was made to the joint credit of the guardian and his sureties.

GUARDIAN AND WARD—ACCOUNTING AS CONDITION PRECEDENT TO SUIT AGAINST SURETIES.—A suit in equity to establish the extent of liability and charge the sureties of a guardian therewith may be maintained, although proceedings for an accounting have not been had against the guardian, if by reason of his death in another state leaving no estate, such accounting is impossible or impracticable.

J. W. Bryant, for the appellants.

O. Powell and D. L. Cady, for the respondent.

538 O'BRIEN, J. The recovery in this action was upon a bond given by the defendants as sureties upon the appointment of the plaintiff's father as her general guardian, she being at that time an infant.

It is undisputed that the guardian received, at or about the time of his appointment, the sum of five hundred dollars which belonged to the plaintiff, and for which he has never accounted. The main defense to the action is based upon the following facts found by the trial court: It appears that the defendants, on becoming the sureties for the guardian, in order to indemnify themselves from any loss, procured him to execute and deliver to them a mortgage upon certain property which the guardian then owned; that subsequently the premises covered by the mortgage were sold, and from the proceeds of the sale the sum of two thousand four hundred and fifty dollars was paid over to the defendants and deposited by them in the American Loan and Trust Company to the joint account of the guardian and the two defendants ⁵³⁹ who were sureties; that the money remained on deposit in the trust company until April, 1891, when it became insolvent and the fund was wholly

lost. The trust company had power to receive deposits and to act as trustee, receiver, administrator, and guardian of infants and their estates. If the fund so deposited was a trust fund held by the guardian, under the circumstances found, and it had been lost without his fault, it may be that both he and his sureties would be held not liable. But this is not a case where trust funds have been lost by a trustee acting in good faith, and the legal principles applicable to such a case are not pertinent to this. The mortgage taken by the sureties never belonged to the plaintiff. It was taken for their individual benefit, in order to secure themselves against any possible future loss by some act on the part of the guardian. When the money was realized upon this mortgage, by the sale of the property, the fund took the place of the original security and belonged to the defendants, and they had absolute and complete control over it just as they had over the mortgage from which it was derived. When they deposited this fund with the trust company it was a deposit of their own funds. The fact that the deposit was made to the credit of the two sureties and the guardian jointly does not change the question. The guardian as an individual had, no doubt, an interest in the fund, which accounts for the form of the deposit, but it was no part of the fund which came into his hands as guardian or which belonged to the plaintiff, his ward. The guardian individually and the two sureties had complete control over it and could have drawn it out of the trust company at their own pleasure. It was not even set apart for the benefit of the plaintiff, and never became impressed with any trust in her favor which she could have enforced. The deposit, therefore, did not represent any investment of the plaintiff's funds made by the guardian for her benefit in good faith or otherwise; and the fact that the deposit was lost by the subsequent failure of the depository is no defense to the plaintiff's claim. With respect to the plaintiff, the case is just the same as if the deposit did
540 not represent the proceeds of the mortgage, but was some other individual fund of the defendants or the guardian himself.

The defendants' obligation was expressed in the conditions of the bond, and these conditions were that if the guardian should in all things faithfully discharge the trust reposed in him and obey all lawful directions of the surrogate touching the trust, and render a just and true account of all moneys and other property received by him and of the application thereof and of his guardianship, whenever required so to do by a court

of competent jurisdiction, then the obligation should be void, otherwise to remain in full force and virtue. The responsibility thus assumed by the defendants has never been discharged, and, therefore, we think the facts found constitute no defense to the action.

It was also urged as a defense that the guardian was dead, and that no personal representative had been appointed, and that neither the guardian nor his personal representative had ever been called upon to account, and that no account had ever been filed. It appears that subsequent to the loss of the fund in the trust company, the guardian removed to another state where he died in the year 1896, intestate, leaving no estate or property either in this state or the state of his residence, and that no personal representative had ever been appointed in either state. Of course, it was impossible, under these circumstances, for the plaintiff to procure a judicial settlement of the account between herself and her guardian. The form of this action is in equity, and the demand for judgment is that it be found and decreed to be due to the plaintiff from her guardian the sum of money received by him, with interest thereon, and, further, that the defendants be charged as sureties with the amount so found due. It is doubtless the general rule that an action cannot be maintained against the sureties upon the bond of a general guardian until proceedings for an accounting have been had against the guardian and his default established therein: *Perkins v. Stimmel*, 114 N. Y. 359, 11 Am. St. Rep. 659, 21 N. E. 729. But this principle is not of universal application. Where it appears that an ⁵⁴¹ accounting is impossible or impracticable, an action in equity to establish the extent of liability and charge the sureties is proper: *Long v. Long*, 142 N. Y. 545, 37 N. E. 486; *Haight v. Brisbin*, 100 N. Y. 219, 2 N. E. 74.

We think that the record does not present any legal error that would justify us in interfering with the judgment, and it should, therefore, be affirmed, with costs.

Parker, C. J., Bartlett, Haight, Vann, and Landon, JJ., concur.

Martin, J., not sitting.

AN ACTION ON A GUARDIAN'S BOND cannot be maintained, as a rule, until proceedings for an accounting have been had against the guardian: *Perkins v. Stimmel*, 114 N. Y. 359, 11 Am. St. Rep. 659, 21 N. E. 729; monographic note to *Commonwealth v. Stub*, 51 Am. Dec. 534.

SWEETLAND v. BUELL.

[164 N. Y. 541, 58 N. E. 663.]

TRIAL—DIRECTIONS FOR VERDICT—WAIVER OF RIGHT TO GO TO JURY.—If defendant excepts to the court's direction to find for plaintiff and to its refusal to direct a verdict in his own favor, without requesting the submission of any specified questions of fact, he thereby submits them to the court; and waives his right to go to the jury thereon.

JUDGMENTS—LIEN OF AGAINST BONA FIDE PURCHASER.—Under a statute providing that a judgment affecting lands shall not have any preference against a bona fide purchaser for a valuable consideration until the record thereof has been filed and docketed, a deed, given by a judgment debtor for a consideration expressed therein, upon the day that judgment is entered, is valid against it in the absence of proof that it was entered first, or that the purchaser had notice thereof, actual or constructive.

COTENANCY—PURCHASE OF OUTSTANDING TITLE.—The rule that the purchase of an outstanding title of one cotenant inures to the benefit of another does not apply when the deed claimed to create the cotenancy does not convey any title.

COTENANCY—OUSTER—ADVERSE POSSESSION.—If a cotenant assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes to take it and goes into possession, the possession thus held by him may be treated as an ouster of the cotenants, and constitute adverse possession.

DEEDS—PRESUMPTION OF DELIVERY.—The fact that deeds are recorded raises the presumption that they were recorded by the grantee, and is prima facie and presumptive evidence of delivery.

G. Wadsworth, for the appellants.

C. H. Timerman, for the respondent.

544 MARTIN, J. This action was commenced against Jonathan S. Buell in April, 1893. In March, 1894, Buell died and subsequently the present defendants, who are the heirs and personal representatives of the decedent, were made parties defendant. The purpose of the action was to compel the determination of a claim of title adverse to that of the plaintiff made by the decedent and those succeeding him in interest. The decedent and the defendants, as successors to his interest, claimed to be the owners of an undivided one-half of the premises in question. As the plaintiff was in possession, this action was brought in pursuance of the provisions of section 1638 of the Code of Civil Procedure.

On and prior to February 5, 1819, premises of which those in question formed a part were owned by one Elijah Holt. They were in what was then Niagara and now is Erie county.

On that day he gave a warranty deed of the premises to one Williams Holt, which was acknowledged and recorded on the sixth day of the same month. The consideration named therein was eighteen hundred and eighty-seven dollars and fifty cents.

545 On the day the foregoing deed was given, one Reuben B. Heacock recovered a judgment in the court of common pleas for Niagara county against Elijah Holt for three hundred and ten dollars. An execution was issued thereon to the sheriff of that county, which was tested June 5, 1819, four months after the judgment was recovered. A sheriff's deed was given April 12, 1820, in which it is recited that by virtue of that execution and another issued on a judgment against Elijah Holt and one Cotton, tested February 12, 1820, he seized the land then owned by Elijah Holt, and, for the sum of three hundred and twenty dollars, sold it to Asa Rice and Joseph Clary, "said Asa and Joseph being executors of John Dill of Otsego county, deceased." This deed purported to grant to Rice and Clary, who were partners in business and executors of the will of John Dill, all the estate, title, and interest that Elijah Holt had in the premises on the fifth day of February, 1819. Asa Rice died in 1823, leaving three children—John D. Rice, who was then of the age of eleven years, Norman Clary Rice, aged five years, and Henry Rice, aged three years. John D. Rice died in 1855 without issue, leaving a widow who died soon after, and leaving Norman Rice and Henry Rice his only heirs at law him surviving, who were also the only surviving heirs of Asa Rice, deceased.

On September 13, 1828, Joseph Clary made, executed, and acknowledged a warranty deed of said premises to Martin Koebel and Adam Pforter. The consideration named was thirteen hundred and forty dollars. This deed was recorded November 5, 1828. On October 17, 1829, Williams Holt, in consideration of two hundred dollars, by warranty deed, conveyed the premises formerly owned by Elijah Holt to Joseph Clary. The deed was recorded upon the same day.

On December 31, 1828, Adam Pforter executed and acknowledged a warranty deed of one undivided half of said premises to Martin Koebel, which was recorded March 14, 1868. The consideration expressed therein was sixteen hundred dollars. On August 1, 1864, Martin Koebel made, executed, and acknowledged a deed to Philip Koebel of the whole **546** of said farm or premises, for the consideration of two thou-

sand five hundred dollars. This deed was recorded February 27, 1868.

September 7, 1868, Philip Koebel made, executed, and acknowledged a warranty deed of the whole of said premises or farm to Elam R. Jewett, which was recorded September 10, 1868, the consideration expressed being six thousand dollars. On February 19, 1886, Elam R. Jewett made, executed, and acknowledged a deed to the Parkside Land and Improvement Company, which was recorded March 16, 1886. This deed conveyed the whole of said farm, including the lands in question, and expressed a consideration of forty-four thousand one hundred and forty-eight dollars. On May 20, 1892, the Parkside Land and Improvement Company made, executed, and acknowledged a deed to the plaintiff, which was recorded May 24, 1892. The consideration expressed was the sum of one dollar. This deed conveyed the premises in question and other lands.

On the 14th of May, 1892, Henry Rice, as surviving heir of Asa Rice, deceased, made and executed a quitclaim deed of said premises to Jonathan S. Buell, the original defendant in this action, which was recorded on the 24th of the same month. The consideration expressed in that deed was the sum of one dollar and other valuable considerations. On December 31, 1892, Norman Clary Rice made and executed a quitclaim deed of the whole of the premises to said Jonathan S. Buell for the consideration of one dollar and other valuable considerations, which, according to the record in this case, was recorded on June 24, 1892, six months before it was made. The date of the deed is probably a mistake.

From this epitome of the chain of title under which the parties claim, we find that Elijah Holt was the common source of title. The plaintiff claimed under the deed from Elijah Holt to Williams Holt, the deed from Williams Holt to Joseph Clary, the deed from Joseph Clary to Martin Koebel and Adam Pforter, a deed of an undivided one-half from Pforter to Martin Koebel, a deed from Martin Koebel to Philip Koebel, a deed from Philip Koebel to Jewett, a deed from Jewett ⁵⁴⁷ to the Parkside Land and Improvement Company, and a deed from the Parkside Land and Improvement Company to the plaintiff.

On the other hand, the defendants claim that under and by virtue of the sheriff's sale under the judgments against Elijah Holt, to which we have referred, and the deed given

in pursuance thereof, the title to the premises passed to Asa Rice and Joseph Clary as tenants in common; that being such tenants in common, a transfer by Clary to Koebel and Pforter conveyed only the title to an undivided one-half of the premises; that the surviving heirs of Asa Rice were vested with the other undivided one-half, and that, by quitclaim deeds to Jonathan S. Buell from the two remaining heirs, their title to the premises was conveyed to him, and hence the present defendants or some of them are the owners in fee of an undivided one-half thereof.

The plaintiff also claims title by virtue of the adverse possession of himself and his grantors. The proof tends to show that as early as 1829 and from then until the title was conveyed to Jewett the grantees of the premises had actual possession of the land, occupied and worked it for farming purposes, raising crops upon it annually, and that after the transfer to Jewett he went into possession thereof and used and occupied it for agricultural purposes, the whole of the land being fenced and under cultivation until November 1, 1885, when the premises were transferred to the land and improvement company; that they were afterward occupied by Jewett in the same way under the improvement company until 1887 or 1888, when the company took possession of the property, caused streets to be laid out and graded, cut the land into lots, advertised them for sale, and occupied it in that way until May, 1892, when the premises in question were conveyed to the plaintiff, who has occupied them since that time. The proof discloses quite clearly that the lot in question was in the exclusive possession of the plaintiff and his grantors for more than fifty years before the commencement of this action, and that such possession was under a claimed right of ownership, ⁵⁴⁸ was open, visible, notorious, and hostile to any other claim. The evidence bearing upon the possession and the manner in which the premises were occupied was undisputed.

When the evidence closed, the defendants moved for the direction of a verdict in their favor. That motion was denied. The court then directed a verdict for the plaintiff, and ordered the defendants' exceptions to be heard in the first instance at general term. The defendants excepted to the court's direction and to its refusal to direct a verdict in their favor. Having stood upon their motion for the direction of a verdict in their favor and upon their exceptions, without requesting the submission of any specified questions of fact, they thereby sub-

mitted them to the court, and waived their right to go to the jury. Consequently, all the controverted facts and inferences in support of the judgment should be deemed to have been established in the plaintiff's favor, and the decision of the court upon the facts must be given the same effect as if the jury had found a verdict in the plaintiff's favor after the case was submitted to it: Baylies' Trial Practice, 322 et seq.; Trimble v. New York Cent. etc. R. R. Co., 162 N. Y. 84, 91, 56 N. E. 532. It follows that the defendants' appeal cannot be sustained unless they were entitled, as a matter of law, to the direction of a verdict in their favor. Hence, the question is whether, under the evidence, the defendants have either established title in themselves, or the plaintiff failed to show that he had title to the premises in question under any view of the evidence which might be taken by the trial court. These questions will be examined in the order in which they are stated.

First, then, have the defendants established a legal title to the premises superior to that of the plaintiff? At the threshold the question arises whether Rice and Clary, by their purchase under the sale upon the execution against Elijah Holt, obtained a title paramount to that acquired by Williams Holt under the deed of Elijah Holt, made on the 5th of February, 1819. It we assume that the evidence was sufficient to show a judgment, an execution issued to the sheriff June 5, 1819, a sale upon such execution, and that a sheriff's deed was given in pursuance of such sale on April 12, 1820, still another point must be determined, which is whether, in view of the fact that the judgment was not docketed at the time of the conveyance to Williams Holt, it constituted a valid lien which was prior or superior to the title obtained by virtue of that deed. If it did not, then it seems clear that as there was no lien upon the premises the deed was valid and passed the title, unless the grantee had notice of such judgment. This sale was made in 1819. Under the statute as it then stood, the docketing of a judgment was not essential to the sale of land by virtue of an execution issued upon it, but the statute expressly provided that no judgment which was not docketed should affect any lands or tenements as to purchasers or mortgagees: 1 Rev. Laws 1813, c. 50, secs. 1, 3. It was held in *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305, that under this statute no judgment would affect any lands, tenements, real estate or chattels real, or have any preference until the record thereof had been filed and docketed. While in *King v. Harris*,

34 N. Y. 330, 332, it was said that the correctness of that decision was not free from doubt, upon principle, as against subsequent liens which did not stand in the bona fide relation of having parted with a consideration, still, the integrity of the decision in the Buchan case was in no way questioned where the relation of the subsequent lien or title was bona fide and the lienor or grantee had parted with a consideration for the property conveyed.

The deed was given and the judgment entered upon the same day, so that it is difficult, if not impossible, to now determine which was first entered or executed. If, however, it be assumed that the Heacock judgment was entered before the delivery of the deed by Elijah Holt to Williams Holt, still, as the judgment was not docketed, it did not affect the Williams Holt title unless he had notice of the judgment. In the deed from Elijah Holt to Williams Holt, the consideration expressed was eighteen hundred and eighty-seven dollars and fifty cents, which was prima facie evidence that the purchase was for a valuable consideration: *Wood v. Chapin*, 13 ⁵⁵⁰ N. Y. 509, 67 Am. Dec. 62; *Ring v. Steele*, 4 Abb. Ct. App. Dec. 68; *Page v. Waring*, 76 N. Y. 463, 469. There is no evidence which would justify the conclusion that Williams Holt had any notice of the judgment against Elijah Holt when he took his conveyance, and no such fact can be presumed. Actual notice of the judgment, or perhaps knowledge or notice of facts which would put a prudent man upon inquiry, would impeach the good faith of such purchaser. But to justify that result there must be proof of actual notice or circumstances tending to show such prior right. Actual notice of itself would impeach the subsequent conveyance, and proof of circumstances short of actual notice which would put a prudent man upon inquiry might authorize a court or jury to infer and find actual notice. But there is no proof in the record upon which it could be properly found that Williams Holt had any notice of the judgment, actual or constructive, when he took his conveyance.

The appellants further contend that as Asa Rice and Joseph Clary were tenants in common under a title obtained by virtue of the sheriff's sale and a deed given in pursuance thereof, Clary could not purchase the outstanding title of Williams Holt for his own benefit, but that as between him and Asa Rice the purchase inured to the benefit of Rice as well as himself, Rice being chargeable with his proportionate share of the expense. The answer to this proposition is that neither Rice

nor Clary, nor both together, obtained any title under the sheriff's deed, as the title vested in Williams Holt before such sale as against them under and by virtue of the deed from Elijah Holt, and, consequently, they never occupied the relation of tenants in common. Again, if the relation of tenants in common ever existed between Clary and Rice, it had ceased at the time Clary took title of Williams Holt, as Clary had previously transferred to Koebel and Pforter all the right, title, and interest he had in the premises, so that at that time he had no title either as tenant in common or otherwise. The purpose of Clary's purchase from Holt is quite obvious. He had given a deed of the premises with a warranty of title, ⁵⁵¹ and, hence, was required to make it good. To do so he subsequently purchased the title of Williams Holt, thus protecting himself against liability under his warranty. While it must be admitted as an abstract proposition of law that the possession of one tenant in common is, in a legal sense, that of all until he assumes a position hostile to the relation of his cotenant and to have an exclusive right to the property, and that he cannot convey their interests in it, yet, for the reasons already suggested, that principle, as well as the principle upon which it is claimed that Clary's purchase inured to the benefit of Asa Rice, has no application here.

Moreover, if one tenant in common assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes to take it and goes into possession, the possession thus taken and held by him may be treated as an ouster of the cotenants and constitute adverse possession: *Clapp v. Bromagham*, 9 Cow. 530; *Bogardus v. Trinity Church*, 4 Paige, 178; *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246; *Florence v. Hopkins*, 46 N. Y. 182, 186; *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312. The evidence in this case warranted the conclusion that the premises in question were in the actual possession of the grantees under the Williams Holt deed and other subsequent deeds purporting to convey the entire estate, and that they took their conveyances as grants having that effect and held possession under them, claiming title of the whole for more than fifty years continuously and for more than forty years since the youngest heir of Asa Rice reached his majority. We think it is clear, for the reasons previously stated, as well as that of the adverse possession of the plaintiff and his grantors, that the children and heirs of Asa Rice were effectually concluded from asserting a claim to any estate in

the premises in question, and hence that their deed to Jonathan S. Buell was ineffectual to support any claim thereto either in his behalf or that of the defendants who succeeded to his title or estate. If it be said that there were questions of fact arising upon the evidence as to adverse possession or notice in Williams Holt of the judgment against Elijah Holt, still, since ⁵⁵² those questions were submitted to the trial court, its disposition of them must be regarded as final.

Whether the sheriff's deed purported to convey the premises to Asa Rice and Joseph Clary as executors of John Dill, or as tenants in common in their own right, under our view of the case, is of no consequence, because, as we have already seen, they took no title under that deed as against the title under which the plaintiff claims. If we are correct in our conclusion that the title to the property in question passed by the deed from Elijah Holt to Williams Holt, the legal title became vested in him, and the occupation of the premises by his grantees of that title is presumed to have been under it and not under the grantees in the sheriff's deed.

We think no reversible error was committed by the court in refusing to receive in evidence a certified copy of the inventory of the estate of John Dill filed by Asa Rice and Joseph Clary as executors, as the question to which that evidence was directed is immaterial to the proper disposition of the case.

The appellants' claim that under their pleadings they were entitled to submit to the jury the question whether the possession of the plaintiff and his grantors was adverse is not before us, as they made no request that it should be thus submitted.

If it be said that there is no evidence of a sufficient delivery of any of the various deeds under which the plaintiff claims title, the answer is that they are all recorded as was shown by certified copies of their record, which raises the presumption that they were recorded by the grantee, and the proof of that fact is *prima facie* and presumptive evidence of delivery: *Wilsey v. Dennis*, 44 Barb. 354; *Devlin on Deeds*, sec. 292; *Lawrence v. Farley*, 24 Hun, 293; *Munoz v. Wilson*, 111 N. Y. 295, 304, 18 N. E. 855.

While the defendants set up in the answer that the deed from Elijah Holt to Williams Holt was void for fraud, no sufficient evidence was offered to support that allegation, and surely there was none which would justify this court in ⁵⁵³ holding as a matter of law that it was fraudulent. If there was

any evidence upon the subject, circumstantial or otherwise, that question has been disposed of by the trial court.

The judgment should be affirmed, with costs.

Parker, C. J., O'Brien, Bartlett, Haight, Vann, and Landon, JJ., concur.

COTENANCY.—THE PURCHASE OF OUTSTANDING titles by cotenants is treated in the note to *Venable v. Beauchamp*, 28 Am. Dec. 83-86. As a rule, such purchases inure to the benefit of all the tenants: *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678, 28 Atl. 287; *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227, 29 N. E. 727.

ADVERSE POSSESSION.—IF ONE COTENANT CONVEYS the whole estate, and his grantee records his deed, enters upon the estate, and claims and holds exclusive possession of the whole thereof, the entry and claim are adverse to the title and possession of the other cotenant, and amount to a disseisin: *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702.

DEED—DELIVERY BY RECORDING.—If a deed is executed and recorded, no formal delivery is necessary, as delivery in such a case is presumed: *McReynolds v. Grubb*, 150 Mo. 352, 73 Am. St. Rep. 448, 51 S. W. 822.

THE LIEN OF A JUDGMENT HAS PRIORITY over a conveyance recorded on the same day on which the judgment was entered: *Hockman v. Hockman*, 93 Va. 855, 57 Am. St. Rep. 816, 25 S. E. 534.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**MONONGAHELA BRIDGE COMPANY v. PITTSBURG &
BIRMINGHAM TRACTION COMPANY.**

[196 Pa. St. 25, 46 Atl. 99.]

CORPORATIONS—DEFINITION—CORPORATE STOCK.—A corporation is an entity, an existence, irrespective of the persons who own its stock, and the fact that one person owns all of the stock does not make him and the corporation one and the same person.

CORPORATIONS—STOCK.—Shares of stock in a corporation constitute a species of property entirely distinct from the corporate property, and a shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. Such shares represent a right to participate in profits only.

CORPORATIONS—COLLATERAL ATTACK ON CHARTER.—The existence of a corporation or its right to exercise its corporate franchises cannot be inquired into or attacked collaterally.

CORPORATIONS.—UNTIL JUDICIALLY DETERMINED In a proper proceeding, the corporate existence of a corporation cannot be denied so as to prevent the corporation from exercising its franchises and enforcing its contracts.

T. Patterson, A. W. Duff, and H. E. Carmack, for the appellant.

J. H. Beal and C. Burleigh, for the appellee.

27 MESTREZAT, J. The facts of this case are fully found and reported by the learned judge of the court below in his opinion on the question reserved at the trial, and we need not restate them in this opinion.

This action was brought by the Monongahela Bridge Company, in its corporate capacity, against the Pittsburg & Birmingham Traction Company on the contracts of August 15,

1889, and May 27, 1890, to recover the tolls due the plaintiff by the terms of said contracts. The defendant denies its liability to pay these tolls since April 11, 1896, for the reason, as stated in its affidavit of defense, that the city of Pittsburg, by virtue of the authority of the act of May 26, 1893, and of the condemnation proceedings pursuant thereto, "purchased and acquired the entire stock of the Monongahela Bridge Company, plaintiff herein, and thereby acquired the possession, ownership and control of said Monongahela bridge, and that the same was purchased at public expense for public use, for a free bridge, and that on and since the eleventh day of April, 1896, the said bridge has been maintained by said city at public expense, as a free bridge, and no toll has been asked or demanded for its use by any corporation or individual, either by said Monongahela Bridge Company or by said city, but the same is maintained by general taxation, and defendant, as a taxpayer of said city, has paid its proportion of the taxes assessed for the payment of the bonds ²⁸ issued by said city for the purchase of said bridge and the payment of interest on said bonds, and the cost and expense of maintaining said bridge."

It will be observed that the defendant alleges the city became the owner of the Monongahela bridge by reason of its having "purchased and acquired the entire stock" of the bridge company. It does not follow, however, that the city is the owner of the property of the company because it purchased its stock. We have been referred to no authority, and we know of none, that asserts the doctrine that the purchaser of all the shares of the capital stock of a corporation thereby becomes the owner of its property. On the contrary, the principle is well established that the shares of the capital stock of a corporation are essentially distinct and different from the corporate property, and that the owner of all the stock of a corporation does not own the corporate property or become entitled to manage or control it. "A corporation," says Mr. Cook in his work on Corporations, section 6, "is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person." In Morawetz on Private Corporations, section 1009, it is said that "it is well settled that all the shares in a corporation may be held by a single person, and yet the corporation continue to exist; and if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his

shares to other persons, so as to conform to the letter of the rule." In *Bidwell v. Pittsburgh etc. Ry. Co.*, 114 Pa. St. 535, 6 Atl. 729, Mr. Justice Clark, delivering the opinion of the court, says: "The shares in a corporation constitute a species of property entirely distinct from the corporate property; a shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it; the shares represent a right to participate in profits only."

It is clear, therefore, that the purchase of the stock of the Monongahela Bridge Company by the city of Pittsburgh did not dissolve the corporation or vest in the city the title to its corporate property, or give the city, as sole stockholder, the right to manage and control the bridge or other property of the corporation. So far as the effect of the purchase of the stock may be inquired into in this action, the city became a stockholder in the ²⁹ corporation, with rights and privileges as such, and nothing more or less.

It is settled beyond all question in this state that the existence of a corporation or its right to exercise its corporate franchises cannot be inquired into or attacked collaterally: *Irvine v. Lumbermen's Bank*, 2 Watts & S. 190; *Cochran v. Arnold*, 58 Pa. St. 399. While this principle would prevent the traction company from interposing as a defense the nonexistence of the plaintiff corporation, it is equally true that under the pleadings in the case and the act of 1885, the defendant could not on any ground attack the corporate existence of the bridge company and thereby prevent a recovery in this action. The act of June 24, 1885 (Pub. Laws, 149), provides: "That in every suit or judicial proceeding in this commonwealth to which a corporation is a party, the existence of such corporation shall be taken to be admitted, unless it is put in issue by the pleadings."

The action here is *assumpsit*, and, as shown by the statement, was brought by the Monongahela Bridge Company, plaintiff above named, a corporation duly organized and existing under the laws of the state of Pennsylvania. There is no denial of this averment in the pleadings, and hence the corporate existence of the plaintiff is admitted by defendant. That the parties to this action duly executed the contracts upon which the suit was brought and that the plaintiff has fully performed its part of the contracts are not denied. This action was brought to compel the traction company to comply with its covenants contained in the contracts. The ownership of the plaintiff's bridge

and as a consequence the right to charge tolls for the use of it are not put in issue by the pleadings. Such being the state of the record, it is clear that the defense set up by the traction company cannot and should not prevail.

It is urged, however, on the part of the traction company, that the city had no right to purchase the stock of the plaintiff corporation with the money of the city under the ordinances approved March 26, 1893, and April 23, 1895, and continue the corporate existence of the bridge company. The reply to that proposition is, that the question it raises cannot be adjudicated in this action. Until judicially determined in a proper proceeding, the corporate existence of the bridge company cannot be denied so as to prevent the corporation from exercising its ³⁰ franchises and enforcing its contracts. Whatever may be the merits of such a defense the traction company is prevented from setting it up in this action. In a proper proceeding, the matters suggested here to relieve the defendant from liability on its contracts may be inquired into and determined, but in this action they cannot be invoked to prevent a recovery.

The assignments of error are overruled and the judgment is affirmed.

A CORPORATION IS A LEGAL ENTITY, separate and distinct from its stockholders: *Moore etc. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 13 Am. St. Rep. 23, 6 South. 41. The corporate body has a distinct identity from that of the individual corporators: *Fletsam v. Hay*, 122 Ill. 293, 3 Am. St. Rep. 492; 13 N. E. 501; *Peirce v. New Orleans Bldg. Co.*, 9 La. 397, 29 Am. Dec. 448; and the purchase of all the stock by one stockholder does not place all the corporate property on the same footing with the other estate of the individual stockholder: *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 42 Am. St. Rep. 335, 21 S. W. 531, 1049.

A SHARE OF STOCK is the right which the owner has in the management, profits, and ultimate assets of the corporation: *Jones v. Concord etc. R. R.*, 67 N. H. 234; 68 Am. St. Rep. 650, 67 Atl. 214.

CORPORATION—COLLATERAL ATTACK.—The validity of articles of incorporation cannot be inquired into incidentally and collaterally: *Pott v. Schumucker*, 84 Md. 535, 57 Am. St. Rep. 415, 36 Atl. 592; *Finch v. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383, 16 S. W. 863. See, further, the monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 184.

SERVICE v. SHONEMAN.

[196 Pa. St. 63, 46 Atl. 292.]

MASTER AND SERVANT—MEASURE OF LIABILITY.—Employers are not insurers of their employes, as absolute safety is unattainable. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in method, machinery, and appliances is the ordinary usage of the business, and no man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man.

MASTER AND SERVANT—MASTER'S LIABILITY.—In an action to recover for injury to an employe caused by a sudden and unusual escape of steam from the end of a boiler, there can be no recovery if the evidence shows that the employer purchased such boiler after extensive inquiry among business men, that he paid a high price for it, that it was recommended as nonexplosive, that similar boilers were in general use, that it was operated by a competent engineer, and that just prior to the accident it was officially inspected and certified to be perfectly safe and in good condition.

R. P. White and J. H. Taulane, for the appellant.

T. L. Vanderslice, M. Stevenson, and C. Goldsmith, for the appellee.

65 DEAN, J. The defendant is a merchant in the city of Philadelphia, using steam power in conducting his business. On August 31, 1890, plaintiff's husband, Thomas Service, was killed, not exactly by a boiler explosion, but by the sudden and unusual escape of steam in great force and large volume from the end of the boiler. At the time of the accident the boiler and engine were in charge of one Rubner, a competent engineer. Service, the deceased, was a sort of porter or "all-around man" in the establishment; at the exact time of his death, he was helping the engineer in the boiler-room. From the testimony of the engineer, who is the only living witness as to how the accident occurred, the boiler and all its attachments were in proper order in the morning when the fire was kindled. About **66** 11 o'clock in the forenoon he heard a hissing noise, as if of escaping steam, in the end of the boiler, where was a three-cornered plate covering three of the boiler tubes and secured by bolt and nut. He discovered a small jet of steam, about the diameter of a lead pencil, escaping from one side of the plate, which to him indicated the plate was loose. At his request Service handed him a wrench where-with, by screwing down the nut on the bolt, the plate would be made tight. As he turned the wrench, the three-cornered

plate, instead of tightening, turned around with the wrench, greatly enlarging the aperture, whereby the steam escaped with great force in large quantity, severely, though not fatally, scalding the engineer, but Service so badly that he died in twenty minutes. The plaintiff, alleging that defendant had furnished a dangerously constructed boiler, and one not in ordinary use, brought this suit for damages. The learned judge of the court below, in a charge admirable for its lucidness, as well as exhaustiveness, in that it presented impartially every question which could be raised on the evidence, submitted the case to the jury, to find whether the construction of the boiler, as to this plate and the method of attachment, was such as was in ordinary use, and had been inspected while in use with ordinary care, saying to them, if they found against defendants in these particulars, they might find a verdict for plaintiff. There was a verdict for plaintiff in the sum of five thousand dollars, and from the judgment entered on it we have this appeal by defendant, with five assignments of error. No one of them is of sufficient merit to warrant discussion, except the fifth, which asks the court, under all the evidence, to direct a verdict for defendant.

The case is a close one. We have most carefully considered the evidence in all its bearings and the law that applies to it, and have concluded that, to permit the judgment, under the undisputed or established facts, to stand, would fix a precedent, practically imposing on the employer the responsibility of an insurer of his employés against accident. However varying may be the rule in some other states, in this it is settled. Take the rule as stated by our brother Mitchell in *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618, 20 Am. St. Rep. 944, 20 Atl. 517. He says: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but ⁶⁷ of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man." For this rule he cites not less than six of our own cases which preceded it; certainly not less than ten have followed, the latest being *Keenan v. Waters*, 181 Pa. St. 247, 37 Atl. 342. Of course, a steam boiler is dangerous, even if of the very best construction; all that can be hoped for is, that the danger shall be minimized by care in construc-

tion and use. Take the undisputed facts as to the care exercised by the owner in the selection of this boiler. When he bought it, three years before the accident, he inquired of a large number of business men who had knowledge on the subject as to the best boiler, and came to the conclusion to see Edward J. Moore, who was said to sell a nonexplosive boiler which he had invented. He sent for Moore, who came. He determined to take this one, after Moore had pointed out its excellencies and superiority. He paid a higher price for it than many others were offered for. Moore gave him the names of a large number of persons who had bought and were then using the boiler. He then employed Rubner, a competent engineer; this is conceded by plaintiff; he ran the boiler and engine for about three years, or up to the date of the accident, without complaint as to its safety; it was operated for nearly four years afterward, when it was sold, only because a larger one was needed. Moore, from whom the boiler had been purchased, had a large experience in the use of boilers, and then invented this pattern. He testifies that he recommended this boiler to Shoneman as the only nonexplosive boiler then in use; that it was used all over the United States, and to some extent in Europe; that at the date of the purchase there were twelve, and at the date of the accident eighty-three, of the same type in use in Philadelphia and vicinity; that the boiler was perfectly safe and that he had never known of an accident by reason of their use. He gives the names and places of business of those using the boiler at the date of the purchase by Shoneman, and of many of those who used it afterward. Other witnesses—engineers—were called, who had charge of the same kind of boilers, and testified that they believed it entirely safe. ⁶⁸ Their opinion was that the accident arose from attempting to screw down the plate while the pressure from the steam was on; that Rubner should first have either drawn his fires or directed the escape of steam through the safety-valve before attempting to manipulate the screw. This, however, is immaterial, for the competency of the engineer is conceded by plaintiff; hence, if the accident came from his neglect, the defendant is not answerable to a coemployé for it, and so the court instructed the jury. The question is, whether Shoneman negligently furnished to Service and other employés dangerous machinery or appliances wherewith to carry on the operations of his business. And, as is said in *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618, 20 Am. St. Rep. 944, 20 Atl. 517, the

unbending test of negligence is the ordinary usage of the business. The care exhibited by defendant in the selection of this boiler then in use, and which to him seemed safer than other boilers, the long use of it without complaint by the engineer, that it was extensively used and favored by many other owners and manufacturers, absolutely rebut the charge of negligence. Assume that there was some conflict in the evidence as to whether the plate over the tubes could have been made safer by some other device or arrangement, nevertheless defendant was not bound to adopt the safest attachment. Over and over we have said no such burden is imposed upon an employer. Assuredly there were in use thousands of different patterns of other boilers which had no such attachment, but there was no evidence that this had ever been rejected because unsafe, or that it had not such extended use as defendant claimed and adduced evidence to establish. He was neither a boilermaker nor an engineer; he could only select one at the suggestion of those who used boilers, or on the recommendation of those who were experts. If, in the exercise of business prudence, he got an unsafe boiler, yet one which was in ordinary use, he is not answerable for the consequences.

Another point was made at the trial which calls for notice. It was alleged on the part of plaintiff that there was no proper inspection of the boiler; that age and use had impaired its strength, and that the consequent weakness may have aggravated the disaster if it did not cause it. We cannot see how other than one view can be taken of the evidence. Either the accident was caused by the unsafe design of the plate over the ⁶⁹ tubes, or by the negligence of the engineer in manipulating the nut with the wrench. But assume that neither was the cause, and that it had its source in the weakness of an impaired boiler, then was there sufficient evidence of neglectful inspection to render defendant answerable? The boiler was several times inspected by the official boiler inspector of the city, who declared it to be in safe condition; the last time just three days before the accident, when the inspector, after examination, delivered to defendant his official certificate of inspection, setting out that the boiler would stand a working pressure of ninety pounds to the square inch, just twice that which was on it when the accident occurred. This official must be presumed to have done his duty; nor is there anything in the evidence to rebut that presumption. But even if he failed, how can defendant be held responsible? He had not the knowledge,

which fitted him to inspect. What else, in the exercise of care, could he do, than rely upon the official certificate of a competent and sworn officer? We think there was no evidence from which the jury could find absence of care on part of defendant in this particular. To hold otherwise would place employers in a situation of as great risk as that of accident insurance companies.

The judgment is reversed and judgment is entered for defendant.

MASTER'S DUTY TO FURNISH SAFE APPLIANCES.—A master is not an insurer of his servant's safety, but he must use reasonable care to protect him from latent defects in appliances for the servant's work: *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225. See, too, the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 592. He is bound to furnish machinery and appliances of ordinary character and reasonable safety, and the former is the conclusive test of the latter: *Kehler v. Schwenk*, 144 Pa. St. 348, 27 Am. St. Rep. 633, 22 Atl. 910. See, too, *Reese v. Hershey*, 163 Pa. St. 253, 43 Am. St. Rep. 795, 29 Atl. 907. An engine, though not of the latest model, if reasonably safe and as well adapted to the business as a more perfect and recent invention, may properly be used, and for an injury resulting therefrom the master is not liable: See the monographic note to *Chicago etc. R. R. Co. v. Swett*, 92 Am. Dec. 220.

BALL v. ANDERSON.

[196 Pa. St. 86, 46 Atl. 366.]

CORPORATIONS, FOREIGN—CONFLICT OF LAWS.—The obligation of a stockholder in a foreign corporation is to be measured as to its extent and character by the law of the state where the corporation is organized.

CORPORATIONS, FOREIGN—CONFLICT OF LAWS—FORCE OF DECISION.—If the supreme court of a state under whose laws a foreign corporation is organized has construed such laws upholding the right of a creditor of the corporation to proceed directly against a stockholder, the courts of another state are bound by such decision on a similar question, although such decision is contrary to a decision of the latter state previously rendered, and although after plaintiff's right has accrued the law of such foreign state has been changed, taking away such right of the creditor.

CORPORATIONS, FOREIGN—RIGHT OF SETOFF.—In a suit by a creditor of a foreign corporation against a stockholder, the latter may set off the indebtedness of the corporation to him, and may prove that the creditor has proceeded against other stockholders in the state where the corporation was organized, and may have collected all, or at least a part, of his claim.

A. W. Bannard and W. S. Windle, for the appellant.

C. H. Pennypacker, for the appellee.

88 MITCHELL, J. The question of the right of an individual creditor of an insolvent Kansas corporation to sue an individual stockholder in this state came before us in *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, 34 Atl. 447. We there expressed the opinion that the liability of the stockholder, though imposed by statute, was contractual in its nature, and should be enforced by any court having jurisdiction of the parties.

We further held that the extent and character of the obligation under the Kansas statutes must be determined by the law as interpreted by the Kansas courts. But the statute was full of unnecessary hardship and injustice to the stockholder and of dangerous opportunity of fraud by the creditor, through suits against individuals all over the country, with no guard against the collection of his full debt successively from each. We therefore endeavored to mitigate the hardship and obviate the **89** injustice of the statute as far as practicable by a construction in harmony with the general principles of equity and our own modes of proceeding. Finding that there was no express decision of the supreme court of Kansas to the contrary, we felt free to hold that, on the appointment of a receiver, the right of action against the stockholder on his individual liability passed to the receiver as an asset for the benefit of all the creditors.

In the present case, however, our attention has been called to a subsequent decision of the supreme court of Kansas upon the exact point. In *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757, it was held that the statute gave the individual creditor an action in his own right against the individual stockholder, the court saying: "It may be, as contended, that the assignee can proceed against the stockholders, and thus obtain a fund for the settlement of the corporate indebtedness, but however that may be, the statute in plain terms confers this right upon the creditor himself, and hence the contention of the defendant that the right of action is vested exclusively in the assignee cannot be upheld."

This closes the question for us. As we have already held, the obligation of the stockholder is to be measured as to its extent and character by Kansas law, and whatever our opinion may previously have been, we are bound to conform our administration of the law to the decisions of the Kansas courts.

The learned judge below followed the case of *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, 34 Atl. 447, and for this, through no fault of his, we must reverse the judgment.

It appears in the present case that since the decisions quoted the legislature of Kansas has recognized the justice of the criticisms on the statute, and has accordingly amended it to conform to the general equitable principles of collection and distribution. This, however, cannot affect the rights of the plaintiff in the present case. It is not a change of remedy only within the entire control of the legislature, but of substantive rights: See *Dexter v. Edmands*, 89 Fed. 467.

The clear weight of authority appears to be in favor of the right of the stockholder to set off the indebtedness of the corporation to him, and it is claimed by appellee that appellant has already proceeded against other stockholders in Kansas whereby he may have collected part or all of his claim. Both defenses should be held open to this defendant.

Judgment reversed and venire de novo awarded.

FOREIGN CORPORATION.—THE LIABILITY OF STOCKHOLDERS of a corporation to the creditors thereof must be determined according to the laws of the state wherein the corporation exists and by whose laws it was organized: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *First Nat. Bank v. Gustine etc. Min. Co.*, 42 Minn. 327, 18 Am. St. Rep. 510, 44 N. W. 198; and if the courts of a state have construed its statutes imposing liability upon stockholders, such construction must be followed by the courts of another state in actions therein to enforce such liability: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349.

CORPORATION.—THE STOCKHOLDER'S RIGHT TO SET OFF a debt due him by the corporation in an action to enforce his statutory liability is considered in the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 871, 872; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

FRISBIE v. McFARLANE.

[196 Pa. St. 116, 46 Atl. 358.]

ACTIONS — PARTIES — BRINGING IN NEW PLAINTIFF.—The power of amendment does not extend to the compulsory bringing in by the defendant of a new party as plaintiff. The defendant comes into court under compulsion, but the plaintiff must come voluntarily, and there is no process known to the law by which one person can compel another to sue him.

ACTIONS — PARTIES — BRINGING IN NEW PLAINTIFFS.—After verdict, parties who have not brought the suit and have never been of record, and as to whom the jury has not been sworn, cannot be added as plaintiffs by praecipe, from the defendant's attorney, and judgment against such plaintiffs is void.

ACTIONS — PARTIES — BRINGING IN NEW PLAINTIFFS.—If defendant is sued by parties whom he claims are not all of the real plaintiffs, he may, nevertheless, prove his setoff against the plaintiffs of record; but if he wants a certificate in his favor against the absent parties, he should plead in abatement, and if the facts are disclosed for the first time during the progress of the suit, he may be allowed to make the same plea puis darrien continuance. But there is no way by which he can put them on record against their will and enter judgment against them.

Rule to strike off verdict and judgment.

William Maxwell, Rodney A. Mercer, and James H. Coddington, for the appellants.

D. C. De Witt and I. McPherson, for the appellees.

118 MITCHELL, J. The irregularity of this judgment is somewhat startling. Hiram Frisbie and Horace Kipp, trading as Hiram Frisbie & Co., brought suit against the defendants, and four trials were had with results varying from a verdict for plaintiffs for one thousand dollars to a verdict and certificate in favor of defendants for nine thousand eight hundred dollars. During the progress of the case the defendants obtained a rule to add the names of G. W. Kipp and E. F. Kizer as plaintiffs. This rule after hearing was properly discharged, but after the verdict and certificate for defendants at the last trial, the names of the same persons were added as plaintiffs by praecipe from defendants' attorneys, and judgment was entered in favor of the defendants against the plaintiffs so added, now appellants, for the amount of the certificate. The appellants had not brought the suit, had never been on the record, and the jury had never been sworn as to them. They were legally entire strangers to the action, and there was no justification of any kind even for the court to enter judgment against them, much

less for counsel to do so after the court had properly refused. How any court allowed so disorderly a proceeding to stand is hard to comprehend.

Counsel for appellees have cited a number of cases in which this court has used very general language as to the power of ¹¹⁹ amendment by adding or striking off parties, etc., but none of them afford any support to this judgment. The power of amendment is very extensive in aid of reaching a just result on the merits of the case, but it does not extend to the compulsory bringing in by the defendant of a new party as plaintiff. The defendant comes into court under compulsion, but the plaintiff must come voluntarily. There is no process known to the law by which one man can compel another to sue him. Even in equity if one who is a necessary party refuses to join as complainant, he must be brought in among the defendants, though his interest may be altogether with the plaintiffs, as not infrequently is done in bills for partition. And in special statutory proceedings to compel actions, such as rules under the acts of 1872 or 1893, on a claimant out of possession to bring his writ of error or ejectment or second ejectment, the rule is not peremptory that he shall sue, but in the alternative, that he sue now or be barred hereafter. Cases where one party plaintiff has a legal right to use another's name as plaintiff, as in suit by partner in the firm name or by assignee of chose in action in the name of the assignor, stand on different ground.

Two cases are so urgently relied on by appellees that they may be specially noticed. In *Chambers v. Davis*, 3 Whart. 40, suit was brought by A. Chambers to the use of Robert Chambers against Davis. At the trial defendant offered in evidence a receipt for a note in part payment, signed by Lafferty & Chambers, with an offer to prove that Lafferty, who signed the receipt, was a partner of Robert Chambers, the use plaintiff. The evidence was admitted and the question of partnership left to the jury. This was held to be correct, this court saying: "If Lafferty was a partner at the time the debt was contracted, his receipt of a note on account of part of the claim would be evidence of payment to that amount"; that is, payment to a partner of the plaintiff is a good payment, though the partner is not on the record. That is sound law, but is far short of allowing the absent partner to be put on record as a plaintiff and entering judgment against him.

In the other case, *Armstrong v. Lancaster*, 5 Watts, 68, 30 Am. Dec. 293, suit was brought in the name of A to the use

of B, against the defendant. B offered evidence of the assignment of the ¹²⁰ claim to him, and the defendant objected that the suit was really by A, as surviving partner of A & A, and there were firm creditors who claimed that the suit should be to their use. The court sustained the objection, but this court reversed on the ground, now well settled, that a verdict for or against the legal plaintiff being a complete protection, the defendant had no concern with disputes among the use plaintiffs. Chief Justice Gibson said in very broad terms: "The court will undoubtedly search out the actual plaintiff where it is necessary, and fix on him the responsibility of a party by subjecting him to costs, a plea of setoff, or any other liability that may be necessary to protect the defendant." But he was speaking of the conflicting use plaintiffs in the case before him, as he proceeds to show that the proper practice was for them to come in after verdict, and have their rival claims adjudicated on an issue or otherwise by the court controlling the verdict or its proceeds.

Where a defendant is sued by parties whom he claims are not all of the real plaintiffs, he may nevertheless prove his set-off against the plaintiffs of record, as was done in *Chambers v. Davis*, 3 Whart. 40, but if he wants a certificate in his favor against the absent parties he should plead in abatement, and probably if the facts are only disclosed as is alleged here, during the progress of the suit, he will be allowed to make the same plea puis darrien continuance. But there is no way by which he can put them on record against their will and enter judgment against them.

The judgment is reversed as to appellants G. W. Kipp and E. F. Kizer, and their names ordered to be struck off the record.

NEW PARTIES.—In some jurisdictions new parties cannot be brought in by amendment of the pleadings; in other jurisdictions they can be: See the monographic note to *White v. Johnson*, 50 Am. St. Rep. 738.

JACK v. KLEPSER.

[196 Pa. St. 187, 46 Atl. 479.]

BANKS AND BANKING—INSOLVENCY—SETOFF.—If a note given by a depositor to a bank is not due at the time of the latter's insolvency, the former may, upon the maturity of the note, set off the amount of his deposit against it.

PARTNERSHIP—SETOFF.—A JOINT CLAIM may be set off by one of the owners in an action against him for his own proper debt, provided he has the assent of his co-owners; and there are no interests of third persons to be prejudiced, and such assent may be given after action brought.

BANKS AND BANKING—PARTNERSHIP CLAIM—SETOFF.—If a deposit in a bank at the time of its insolvency belongs to two partners, and one of them assigns his interest to the other, the latter may set off the deposit against a note of another partnership of which he is a member, and which note is held by such bank.

Case stated: "1. That on December 14, 1896, William Jack and Anthony S. Morrow, surviving partners of a copartnership doing business under the firm name and style of the Martinsburg Deposit Bank, of Martinsburg, Pennsylvania, made, executed, and delivered to the use plaintiff, William S. Nicodemus, their certain deed of assignment of all their property and effects in trust for the benefit of their creditors; and thereafter, and on or about January 13, 1897, the said assignee duly filed in the office of the prothonotary of this court an inventory and appraisement of the said estate and effects so assigned, and on or about January 14, 1897, presented to this court his bond in double the amount of said appraisement, which on said date was duly approved and filed, and that thereupon he became and now is the duly qualified and acting assignee of said the Martinsburg Deposit Bank, of Martinsburg, Pennsylvania; and that said inventory and appraisement shows that the claims of the creditors of said assigned bank cannot be paid in full. 2. That at Martinsburg, Pennsylvania, on October 16, 1896, for value received, the defendants, Harry M. Klepser and Abram B. Woodcock, under the firm name and style of Kelpser & Woodcock, made, executed, and delivered to one D. M. Klepser their certain promissory note, in writing, whereof the following is a true copy:

"\$1,500.00.

Martinsburg, Pa., Oct. 16, 1896.

"Sixty days after date, we promise to pay to the order of D. M. Klepser, fifteen hundred (1,500) dollars, without defal-

cation or stay of execution, waiving exemption, for value received. Payable at Martinsburg Deposit Bank, Penna.

“(Signed) KLEPSER & WOODCOCK.”

“That upon said date the defendant D. M. Klepser, payee in the said note, for value received from the Martinsburg Deposit Bank, of Martinsburg, Pennsylvania, duly indorsed the said note to said bank by writing his name upon the back thereof; and upon December 15, 1896, the said D. M. Klepser duly waived protest on, and guaranteed payment of, the said note, and that the following are true copies of the indorsement, waiver, and guaranty upon the back of said note, to wit: (Signed) ‘D. M. Klepser.’

“‘I hereby waive protest on within note, Dec. 15, 1896, and guarantee payment. (Signed) D. M. KLEPSER.’

“That said note became due on December 15, 1896; that the same was duly presented at the bank of payment designated therein for payment; that no part thereof has been paid; that plaintiffs are the legal owners and holders thereof, and that there is due thereupon from the defendants to plaintiffs the sum of fifteen hundred dollars, with interest from December 15, 1896. 3. That upon the date of the assignment aforesaid, the defendants Klepser & Woodcock herein had upon deposit in said bank to their credit, subject to check and unappropriated to any other purpose, the sum of ninety-six dollars and ninety-four cents. 4. That upon the date of the said assignment, Abram Woodcock and James Curry, copartners doing business as Woodcock & Curry, had upon deposit in said bank, subject to check and unappropriated to any other purpose, the sum of thirteen hundred and forty-six dollars and seven cents.” Judgment for defendants, and plaintiffs appealed.

O. H. Hewit, for the appellants.

W. I. Woodcock, for the appellees.

¹⁹² McCOLLUM, J. The single question to be considered and determined on this appeal is whether the learned court below erred in deciding that the deposits specified in the third and fourth paragraphs of the case stated were legally a subject of setoff against the promissory note and indebtedness specified in the second paragraph thereof.

At the time of the failure of the bank the note described in the second paragraph of the case stated was not due, but this

fact was no obstruction to the exercise, by Klepser & Woodcock, of their right to set off against the note the deposit mentioned in the third paragraph: *Jordan v. Sharlock*, 84 Pa. 366, 24 Am. Rep. 198.

The deposit mentioned in the fourth paragraph of the case stated was the property of the firm of Woodcock & Curry, and Woodcock was also a member of the firm of Klepser & Woodcock. Curry, shortly after the failure of the bank, transferred his interest in the deposit to Woodcock, who claimed to have a legal right to set off the deposit against the note of which ¹⁹³ Klepser & Woodcock were makers, and D. M. Klepser was payee and indorser, and who, for value received, transferred the same to the Martinsburg Deposit Bank and guaranteed the payment thereof.

In *Wrenshall v. Cook*, 7 Watts, 464, the sole bar to the set-off presented by the defendant was the failure to include in the case stated the consent of his copartners. In *Tustin v. Cameron*, 5 Whart. 379, it was held "that the defendants might set off a debt due by the plaintiff to a company or partnership of which the defendants were members, the other members of the company or partnership authorizing the same." The principle discussed in *Wrenshall v. Cook*, 7 Watts, 464, is not a mere dictum. It was enforced in *Tustin v. Cameron*, 5 Whart. 379, and has not been departed from in any of our cases since. It is apparently applicable to the case at bar, the equity of which appears to require its enforcement.

In *Smith v. Myler*, 22 Pa. St. 36, Woodward, J., in delivering the opinion of the court, said, *inter alia*, that "a joint claim may be set off by one of the owners in an action against him for his own proper debt, provided he have the express assent of his copartners, and there are no third interests to be prejudiced," and that "this assent may be given after action brought." The cases referred to as supporting these views were those cited above, and *Craig v. Henderson*, 2 Pa. St. 261, 44 Am. Dec. 193, *Solliday v. Bissey*, 12 Pa. St. 347, and *Hart v. Porter*, 5 Serg. & R. 200. One of two or more defendants may set off his individual claim against the plaintiff's joint claim: *Miller v. Kreiter*, 76 Pa. St. 78, and cases cited therein.

No good reason appears for denying to Woodcock the right to set off the deposit in question against the note in suit. It constitutes an equitable and just defense, and there is in the cases since *Tustin v. Cameron*, 5 Whart. 379, no visible obstruction to the allowance of it. We therefore concur in the con-

clusion arrived at in the clear and logical opinion of the learned judge of the court below.

Judgment affirmed.

SETOFF AGAINST BANK.—If a bank becomes insolvent, a depositor may set off his deposit against his notes to the bank: See the monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 585.

SETOFF—PARTNERSHIP.—A debt due from a bankrupt and others as partners may be set off against a demand due to the bankrupt individually: Monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 592. But see *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670, 76 N. W. 433.

WILKINSON v. McCULLOUGH.

[196 Pa. St. 205, 46 Atl. 357.]

BROKERS — COMMISSIONERS — SALE OF REAL ESTATE.—A real estate broker employed to find a purchaser for land is bound to disclose to his principal any facts known to him material to the transaction, and if he takes part in the negotiation, he is bound to exert his skill for the benefit of his principal; otherwise he is not entitled to commissions.

BROKERS—COMMISSIONS—REAL ESTATE SALES.—If a real estate broker conceals from his principal the name of the purchaser procured by him, and also that such purchaser has bought an adjoining parcel of land, for the purpose of preventing his principal from raising his price, he does not act in good faith, and is not entitled to commissions.

F. C. Osburn and J. C. McCombs, for the appellant.

W. F. McCook, for the appellee.

206 PER CURIAM. This action of assumpsit was brought to recover commissions on a sale alleged to have been made by the plaintiff of real estate belonging to the defendant.

On the trial the court was requested to instruct the jury, *inter alia*: "That under all the evidence their verdict should be for the defendant." This instruction was refused and the case was submitted to the jury mainly on the proposition contended for by the plaintiff, that acting as defendant's agent for the sale of the property in question, he had procured and presented to her a purchaser who was able, ready, and willing to buy the property at the price previously named by her, *viz.*, \$50,000, but she refused to sign the contract of sale, and shortly afterward

sold the property to another person at an advance of about twenty per cent on that sum. In thus refusing to charge as requested, defendant contends that the learned trial judge erred in not giving proper effect to part of plaintiff's evidence which was properly before the court. In this we think she is correct.

It appears to us that the controlling question raised by the plaintiff's own evidence was, whether he acted with that good faith toward his principal which the law requires, and without which no claim to commissions can be sustained.

The history of the transaction as testified to by the plaintiff himself is briefly as follows: Defendant was the owner of a lot on the corner of Liberty street and Cecil alley, Pittsburg. The buildings on the lot having been destroyed by fire, the defendant offered it for sale. About that time plaintiff had a conversation with T. C. Jenkins, a flour merchant, in which the latter said: "He would buy the Gormeley and McCullough properties, which adjoined each other, provided he could get them at a fair price. He did not want to appear personally in the matter, and he told his manager and his attorney, Mr. James A. McKean, to attend to the matter." Plaintiff succeeded in buying the Gormeley property for Jenkins, and as to defendant's ²⁰⁷ property adjoining, he testified that Jenkins instructed his manager and his attorney "to have me buy the property for him." On cross-examination he testified: "I had been instructed by them to buy the property if I could get it at a fair price." Defendant's asking price for her property was \$50,000, although plaintiff testified that she said to him: "I want you to go ahead and get the best bid that you can." He further testified: "We used our best endeavors to get the price for her, and we made her bids of \$43,000, \$44,000, and \$45,000 for the property." These offers were all refused by the defendant. Finally, on July 1, 1897, plaintiff presented to defendant James A. McKean as the purchaser, and a contract of sale for \$50,000 was drawn up in his name for defendant's signature. At her request the meeting was adjourned to N. Holmes and Son's Bank, that she might have the benefit of Mr. Holmes' advice. Various matters relating to the sale were there discussed, and, among other things, defendant asked "who the property would finally go to." This the plaintiff refused to disclose. In his own language, they "wouldn't tell her that until she signed the paper, because she would jump the price on us." In other words, as expressed by plaintiff, if defendant learned that Mr. Jenkins was the real purchaser she would understand his need for her

corner lot and would raise the price accordingly. The defendant, in the end, failed to sign the contract of sale, and finally broke off all negotiations with the plaintiff. In September following, without the intervention of an agent, defendant sold the property to T. C. Jenkins for \$60,000 or \$62,000.

Many other extracts from plaintiff's testimony might be given as to declarations made by him and a course of conduct on his part utterly at variance with his relation as agent for the defendant, but in the view we take of the case it is unnecessary. It is conclusively established by plaintiff's own testimony that he failed to furnish defendant all the information to which she was justly entitled, including the important facts that Jenkins was the real purchaser and that he had already purchased the adjoining property. He does not pretend that this occurred by any oversight. His own testimony is emphatic that in answer to defendant's request he positively refused to give her the name of the real purchaser; and the reason he assigned for his refusal to do so is in perfect harmony with that part of his ²⁰⁸ testimony wherein he said: "I had been instructed by them [Jenkins' manager and attorney] to buy the property if I could get it at a fair price. . . . I wouldn't tell her that [who the property would finally go to] until she signed the paper, because she would jump the price on us," etc. The plaintiff's conduct in the premises, as testified to by himself on the witness stand, convicts him of bad faith toward the defendant.

The application of sound principles of law to the conclusively established facts of the case is quite plain. The general principle is that out of consideration for the weakness of human nature, the law will not permit real estate brokers and others occupying fiduciary relations to place themselves in a position where they are open to the claims of conflicting duties, or to the claims of duty conflicting with self-interest. The principle is variously expressed according to the varying circumstances which call for its application: A trustee may not purchase at his own sale, etc., and, as in the present case, one may not be agent for or serve the interests of both buyer and seller: *Young v. Hughes*, 32 N. J. Eq. 372; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756. In the latter case it was held that a broker who had acted for both parties in negotiating an exchange of real estate between them, without informing either that he was employed by the other, is not legally entitled to commissions for his services, etc.

In the former case it was held that a real estate broker employed to find a purchaser for land is bound to disclose to his principal any facts known to him material to the transaction; and if he takes part in the negotiation, he is bound to exert his skill for the benefit of his principal.

In *Rice v. Davis*, 136 Pa. St. 439, 20 Am. St. Rep. 931, 20 Atl. 513, this court held that where a broker employed to sell shares of stock for his principal, received with knowledge of the latter a compensation from the purchasers, he could not recover commissions for the sale. It was there said, at page 442: "The principle underlying this case that an agent for the sale of property cannot at the same time act as agent for the purchase thereof, or interest himself therein, and thus entitle himself to compensation from both vendor and vendee, is grounded on the infallible declaration that 'no man can serve two masters.'"

In commenting on the relation of real estate brokers to their ²⁰⁹ principals, it was said in *Rich v. Black*, 173 Pa. St. 92, 99, 33 Atl. 880, that: "The relation which such agents bear is confidential and disarms the vigilance of their principals; it affords peculiar facilities for obtaining exclusive information in respect of the property intrusted to them for sale; their employment implies that they have superior advantages for making sales and that they will use every effort and means to obtain the highest price for the benefit of their principal": See, also, *Addison v. Wanamaker*, 185 Pa. St. 536, 39 Atl. 1111.

In the leading case of *Everhart v. Searle*, 71 Pa. St. 256, the decision is rested on the ground of public policy. Quoting from *Hare and Wallace's Leading Cases in Equity*, it is there said: "It matters not that there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it."

In *Pratt v. Patterson*, 112 Pa. St. 475, 3 Atl. 858, it appeared on the trial by plaintiff's own testimony that the party presented to the defendant as the proposed purchaser was not the real purchaser, and the court entered a compulsory nonsuit. In affirming that judgment this court said: "Good faith forbade the concealment of an arrangement intended for the advantage of the buyer rather than of the seller." That case virtually rules the one before us.

In *Cannell v. Smith*, 142 Pa. St. 25, 21 Atl. 793, commissions were recovered back from a broker on proof that he had acted as the agent of the purchaser.

It is unnecessary to multiply authorities or comment further on the underlying principle. Enough has been said to show that under the law and the facts established by the plaintiff's own evidence he was not entitled to recover the commissions claimed by him, and defendant's first point should have been affirmed.

Judgment reversed.

BROKER'S DUTIES AND COMMISSIONS.—A broker cannot take upon himself incompatible duties and characters, or act in a transaction in which he has an interest adverse to that of his principal. And if he acts adversely to his principal, or omits to disclose any interest which naturally would influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services: See the monographic note to *Walker v. Osgood*, 93 Am. Dec. 174. The right of brokers to commissions is considered further in the note in *Kalley v. Baker*, 28 Am. St. Rep. 546-548.

BREW v. HASTINGS.

[196 Pa. St. 222, 46 Atl. 257.]

PARTNERSHIP—CONTINUANCE AFTER DEATH OF MEMBER.—IT IS NOT FRAUD, ACTUAL OR CONSTRUCTIVE, upon creditors for a debtor to enter into a partnership agreement in a legitimate business for a term of years, with a stipulation that the death of a member during that period shall not work a dissolution of the firm, but that his interest shall remain in the partnership and his representatives have no voice or control in the management.

PARTNERSHIP—CONTINUANCE AFTER DEATH OF MEMBER.—Stipulation in articles of partnership for the continuance of the firm after the death of a member, and until the consent of all of the partners is given to a dissolution, are valid and binding, and on the death of an individual partner will prevent a dissolution.

H. C. McCormick and Reeder & Quigley, for the appellants.

J. M. Dale and C. P. Hewes, for the appellees.

227 DEAN, J. George W. Jackson and defendants, by written agreement, on September 1, 1897, formed a copartnership in the banking business at Bellefonte, Centre county, Pennsylvania. On October 22, of the same year Jackson died. On August 10, 1898, his administrators filed this bill, praying: 1. For a decree of dissolution; **228** 2. For an account; 3. For a

receiver. The defendants denied the right to a decree in plaintiffs' favor on any one of the prayers, averring that the agreement stipulated for the continuance of the partnership for the term of ten years from its date, and that the death of a member during that period should not work a dissolution, but that his interest should remain in the partnership, his representatives, however, to have no voice or control in the management; his estate, nevertheless, to receive six per cent on the amount of capital invested by him, and, further, to receive such share of the earnings as the deceased would have been entitled to had he lived. It was further averred that while negotiations looking to a closing out of the entire interest of Jackson had been opened between the parties after his death, they were still pending when the bill was filed, and they, therefore, rested for defense on the written agreement. Evidence was taken on motion for preliminary decree, as to whether there had been, as a fact, a parol agreement between plaintiffs and defendants for a dissolution, and as to whether the deceased partner at his death was insolvent. The court below does not find positively that there was a parol dissolution of the partnership after the death of Jackson, but says defendants considered it dissolved. Further, it found that Jackson, at his death, was practically insolvent, and in substance held, as a matter of law, that an insolvent member of a partnership could not tie up his estate or part of it by a partnership agreement of this nature so as to protect it from possession for purposes of administration by his legal representatives; that such agreement was, in effect, a fraud upon creditors. It was therefore decreed that the partnership be dissolved, that defendants account, and that plaintiffs have full access to the books, accounts, and papers of the partnership. Further, that if the parties failed to arrive at a satisfactory accounting and settlement within sixty days, that then an expert accountant would be appointed by the court as an assistant to the court.

From this decree it necessarily followed that if defendants did not submit, a receiver would have to be appointed to enforce it, which was the alternative prayer of the bill.

We now have this appeal by defendants, who assign for error the action of the court.

²²⁰ As to the fact found by the court that there was, by parol, an agreement for a dissolution of the partnership, there is no evidence worthy the name to sustain the finding. There were propositions from both sides for settlement, not acceded to

by either, and no conclusion reached; this is so manifest that it would be a waste of time to narrate the evidence bearing upon the question. Necessarily, the partnership was dissolved, as concerned any further personal participation in the control or management by Jackson, and the agreement positively stipulated that in that event his representatives were to be excluded during the term. The plaintiffs in their negotiations sought a settlement for his interest immediately. Defendants were not averse to such settlement, but they were wide apart as to the amount to be paid for the interest of the deceased partner; on this their minds never met. The averments of the bill, especially the ninth and tenth paragraphs, show such was the view of plaintiffs.

As to the fact that the estate of Jackson is insolvent, and therefore such an agreement was a fraud upon his creditors, the reasoning of the learned judge is singularly inconclusive. Admit as a fact, which is at least doubtful, that Jackson, at the date of the agreement, when he bound himself as the other three partners did, was insolvent, there is no averment that the others had knowledge of such fact, or that there was any fraud or collusion between them. Why, then, even if Jackson intended to tie up this part of his estate in a perfectly fair and business-like agreement, should they suffer? But is it a fraud, actual or constructive, upon creditors, for a debtor to enter into a partnership agreement in a legitimate business, with a prospect of gain, for a term of years? The extent, value, and place of the investment can be known with proximate certainty by all creditors. Nothing is concealed. The investment of capital in a copartnership in the banking business was as open as a loan secured by mortgage of record payable in ten years, or the lease of a farm to a tenant for the same period. It in no proper sense put the investment out of the reach of creditors. At most, it only modified or changed the form of remedy to reach it. The learned judge of the court below has cited no authority in support of his view; we are confident there are none. All our cases are directly to the contrary. "Stipulations²³⁰ in articles of copartnership for the continuance of the firm after the death of a member and until the consent of all the partners is given to a dissolution, are valid and binding, and on the death of an individual partner will prevent a dissolution": Leaf's Appeal, 105 Pa. St. 505. This quotation is but a summary of the law as laid down by this court seventy-five years ago in Gratz v. Bayard, 11 Serg. & R. 41, and fol-

lowed ever since, the last case being *Wilcox v. Derickson*, 168 Pa. St. 335, 31 Atl. 1080. All the text-writers—Story on Partnership, Teller on Executors, Collyer on Partnerships, and Williams on Executors—state the law to be substantially as quoted. The decree does not rest on either reason or authority. If it were carried to its probable result, the court would take possession of the bank through its own officer, as receiver, and wind up its affairs in the interest of creditors. This business courts generally seek to avoid. In the interests of the public, sometimes they take possession of carrying corporations, and in rare cases of business partnerships, but only with great reluctance. There is no reason why, even in a doubtful case, they should dissolve a perfectly solvent banking partnership in the interest of importunate creditors or complaining representatives of a deceased member, in the face of an express stipulation by all the partners to the contrary. As both parties have treated this as a final hearing, the decree is reversed, and the bill is dismissed at costs of appellee.

Partnership After Death.*

The Effect of the Death of one of the members of a partnership is generally to dissolve the partnership from that moment: *Parker v. Parker*, 99 Ala. 239, 42 Am. St. Rep. 48, 13 South. 520. And the surviving partner has no authority to carry on for the future the partnership trade or business, or to engage in new transactions, contracts, or liabilities on account thereof: *Durant v. Pierson*, 124 N. Y. 444, 21 Am. St. Rep. 686, 26 N. E. 1095. Death operates as a dissolution, whether it is known or unknown, or whether third persons have notice thereof or not: *Dexter v. Dexter*, 43 N. Y. App. Div. 268, 60 N. Y. Supp. 371. This is always the result where one of the partners dies, unless a contrary provision has been made either by the contract of the parties, or by the terms of a will left by the deceased partner: *Scholefield v. Eichelberger*, 7 Pet. 586; *Davis v. Christian*, 15 Gratt. 11. But there must be an express stipulation to that effect: *Knapp v. McBride*, 7 Ala. 19; *Gratz v. Bayard*, 11 Serg. & R. 41. And a provision in the articles of copartnership that the partnership shall continue for a fixed term of years is not a sufficient express stipulation which will prevent a dissolution on the death of one of the firm members: *Goodburn v. Stevens*, 5 Gill,

*REFERENCES TO MONOGRAPHIC NOTES.

What is a sufficient cause for the dissolution of a partnership: 69 Am. St. Rep. 410-436.

Powers, rights, liabilities, and remedies of partners after the dissolution of the firm: 40 Am. St. Rep. 561-576.

Powers and duties of surviving partners: 65 Am. Dec. 295-303.

Proceedings to enforce partnership liability where one of the partners has died: 77 Am. Dec. 114-117.

Power of equity to continue partnership for benefit of infant heirs: 56 Am. Dec. 517, 518.

1; *Williamson v. Wilson*, 1 Bland, 418; *Davis v. Christian*, 15 Gratt. 11.

Continuation for Purpose of Winding Up.—After dissolution, however, by death or from any other cause, a partnership still has a limited existence for the purpose of closing up the affairs of the partnership. The firm is to this extent not completely dissolved until its affairs are closed. Up to that time the joint interest of the partners continues in the partnership property, and the mutual agency continues for the purpose of winding up its business: *Kinsler v. McCauts*, 4 Rich. 46, 53 Am. Dec. 711; *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138; *Brown v. Higginbotham*, 5 Leigh, 583, 27 Am. Dec. 618. So far as is necessary for the purpose of closing the concerns of the partnership, it continues with all its incidents of interest, powers, and obligations: *Davis v. Megroz*, 55 N. J. L. 427, 26 Atl. 1009. In legal contemplation the partnership continues for the purpose of making good all outstanding engagements, of taking and settling all accounts, and collecting all the property, means, and assets of the partnership existing at the time of its dissolution, for the benefit of all interested: *Western Stage Co. v. Walker*, 2 Iowa, 504, 65 Am. Dec. 789; *Johnson v. Totten*, 3 Cal. 343, 58 Am. Dec. 412. Though it seems to be intimated in *Powell v. Hopson*, 13 La. Ann. 626, that a special contract is necessary in order to continue a partnership after the death of one of its members even for any purpose, the rule is firmly established that to a limited extent, and for the purposes already noted, a partnership always continues to exist after one of the partners has died.

Continuation After Death, Generally.—The notion that a partnership can continue after the death of one of its members would seem to be a misuse of terms. One who has died cannot by any possibility continue to be a member of a firm, and that the firm to which he belongs must of necessity cease at his death would appear to follow logically and necessarily from this obvious fact. And while the rule laid down by the principal case is undoubtedly the true rule, when properly understood, it has not been allowed to go unquestioned by some of the courts of this country. Thus, in *Gibson v. Stevens*, 7 N. H. 352, it was doubted whether the term "partnership" could be properly applied where the business was carried on by a single survivor in accordance with the terms of the will of the deceased partner. While recognizing the rule established by the principal case, the court, in *Exchange Bank v. Tracy*, 77 Mo. 594, admitted that the term was inaccurate, and that the relation after the death of one partner was not in its true nature a continuation of the old partnership, but was necessarily the creation of a new one: See, also, *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111. In *Laney v. Laney*, 6 Dem. 241, a provision in a partnership agreement which continued the relation for three years after the death of either partner was declared to be void, as being beyond the com-

potency of the parties thus to modify or abrogate the law of wills and intestate distribution. The court observed that "if such an agreement is valid for three years after death, it must be equally so for one hundred years, and thus by partnership agreements, appearing valid on their face, the whole law relating to wills and trusts could be circumvented and rendered practically of no effect." Generally, however, the courts, while calling attention to the inaccuracy of speaking of a partnership as continuing after death, have not taken the view that such an arrangement was illegal or void, and have repeatedly upheld partnership agreements of this character. Perhaps the best expression of this misuse of language is to be found in *Parsons on Partnership*, 407, quoted in *Kennedy v. Porter*, 109 N. Y. 526, 549, 17 N. E. 426. Speaking of the effect of the death of one partner, he says: "Dissolution follows immediately and inevitably. This rule has been distinctly declared only of late years, for it was in 1808, or about that time, that Lord Eldon declared in several cases that the death of any one in any number of partners dissolves the partnership. And even then that chancellor put in the qualification that the death of a partner operates as a dissolution of the partnership unless provision is expressly made to the contrary. We doubt very much whether this qualification be necessary or accurate, for we do not believe that any provisions made beforehand, in reference to the death of a partner, or any agreements or arrangements made subsequently to his death can prevent this dissolution. . . . As a partner who has died cannot by any possibility continue a member of the firm, so any firm of which he is not a member, whether it contains his executors or his children, cannot be the same firm as that of which he was a member." The same view was taken in *McGrath v. Cowen*, 57 Ohio St. 385, 49 N. E. 338, where it was held that a dissolution necessarily takes place upon the death of one partner; and that a continuation of the business by the surviving partner and the executor of the deceased partner in pursuance of a direction in the will was really the formation of a new partnership. However inaccurate the term may be, the law recognizes the right of partners to continue the partnership after the death of a member if they so agree. And a partnership after death is an entity known to the law and which has a very real existence. Though the relationship ceases so far as the dead partner is concerned, it continues with reference to the business itself and to the property invested in it. The real purpose and effect of a partnership after death is to enable the survivors and the representatives of the deceased to conduct the business as before, and to deal with partnership assets the same as if no dissolution had occurred. Otherwise, in the absence of any agreement to continue the business, the survivors would have power only to wind up the partnership affairs, and could not bind the assets by any new agreement which they should make: *Roberts v. Hendrickson*, 75 Mo. App. 484. The provision in partnership articles for the

continuation of the business, and that the death of one partner should not operate as a dissolution, was held in *Powell's Appeal*, 2 Sup. Ct. Rep. 618, to mean only that the partnership accounts should not be wound up or any portion of the capital withdrawn from the business, and provided a ready means for the formation of a new partnership, but that it did not in reality prevent a legal dissolution. A similar meaning was conveyed by *Parsons* in his work on *Partnership*, 407, when he said that: "What is inaccurately called provision against the dissolution of the partnership is an agreement that if either party dies his property shall remain in the firm and in the business for the benefit of his children, or that his children, or some one of them, or some other person, shall immediately on his death, take his place in the firm and become partner in his stead": *Kennedy v. Porter*, 109 N. Y. 526, 549, 17 N. E. 426. For further illustration, see *Evans v. Watts*, 192 Pa. St. 112, 43 Atl. 464. So far as concerns the carrying on of the business and power to bind the partnership assets the relation continues after death. It is also a real continuance in another particular, as where the articles of copartnership provide that in the event of one partner's death the business shall be carried on by the survivors, subject to the advice and inspection of his executors, in which case the executors have no power to dissolve the partnership, though the survivors should act in opposition to their advice: *Gratz v. Bayard*, 11 Serg. & R. 41.

We shall later see in what manner partnerships after death are provided for. It is only necessary to note here that a simple provision in partnership articles for the continuance of the relation for a fixed period is not such an agreement as will prevent a dissolution upon the death of one of the partners: *Hoard v. Clum*, 31 Minn. 186, 17 N. W. 275; *Knapp v. McBride*, 7 Ala. 19; *Scholefield v. Eichelberger*, 7 Pet. 586. The fact that certain agreements entered into by the partnership are to continue for a stated time does not prolong the life of the partnership except for the limited purpose of fulfilling its engagements already made: *Maynard v. Richards*, 166 Ill. 466, 57 Am. St. Rep. 145, 46 N. E. 1138. There is an implied condition or reservation in every partnership agreement for a fixed term that the relation is dissolved by the death of any of the partners at any time within the period: *Goodburn v. Stevens*, 5 Gill, 1.

Continuation Under Partnership Agreement.—The most frequent method of providing for the continuance of the existence of a partnership is through the medium of the articles of copartnership. And where a covenant for the continuation of the partnership for a reasonable period after the death of one of the partners is found in the partnership agreement, there is no doubt of its validity, and that it is binding on the estate of the deceased partner. "Such a covenant to continue the business," said the court in *Laughlin v. Lorenz*, 48 Pa. St. 275, 86 Am. Dec. 592, "and thereby to prevent loss, following a sudden demise and winding up, is certainly no

exception to the general rule which devolves contract liabilities upon the estate and prefers creditors to those who are to succeed to the estate. There is no reason why such a covenant should be less binding than a bond of indemnity, or of suretyship where the breach happens after death, or a covenant to do acts or pay money at a future day." The case of *Laney v. Laney*, 6 Dem. 241, already noticed, considered such an agreement to be invalid as an attempt to modify and abrogate the law of wills and intestate distribution. But aside from this case the entire weight of judicial authority sustains contracts for the continuation of a partnership after the death of one of its members: *Vincent v. Martin*, 79 Ala. 540; *Rand v. Wright*, 141 Ind. 226, 39 N. E. 447; *Powell v. Hopson*, 13 La. Ann. 626; *Scholefield v. Eichelberger*, 7 Pet. 586; *Exchange Bank v. Tracy*, 77 Mo. 594; *Edwards v. Thomas*, 66 Mo. 468; *Stanwood v. Owen*, 14 Gray, 195; *Gratz v. Bayard*, 11 Serg. & R. 41; *Wilcox v. Derickson*, 168 Pa. St. 331, 31 Atl. 1080; *Alexander v. Lewis*, 47 Tex. 481; *Davis v. Christian*, 15 Gratt. 11; *McNeish v. United States etc. Oat Co.*, 57 Vt. 316; *In re Laney*, 2 N. Y. Supp. 443. The agreement to continue the partnership must be clear. Since by operation of law a partnership is dissolved by the death of one of its members, any agreement taking the partnership out of this rule must be distinctly shown by satisfactory evidence: *Alexander v. Lewis*, 47 Tex. 481; *Gratz v. Bayard*, 11 Serg. & R. 41; *Exchange Bank v. Tracy*, 77 Mo. 594; *Kirkman v. Booth*, 11 Beav. 273; *Berry v. Folkes*, 60 Miss. 576. A misapprehension of the effect of death on the partnership will not operate to continue the contract, especially where there is a clear intention to terminate it: *Williams v. Philadelphia etc. Co.*, 150 Pa. St. 20, 24 Atl. 346. It seems that where the partnership is in form a joint stock company, with transferable shares similar to a corporation, and with regular officers, meetings, and records, a limitation on the agency of the different partners in the transaction of the business, and the management of the business is intrusted to the care of a general agent, that less evidence is required to establish an intention to continue the partnership after the death of a member than in other cases: *McNeish v. United States etc. Oat Co.*, 57 Vt. 316. Where partnership articles provide that the executor of a deceased member shall carry on the business with the survivors, the survivors are required to allow such executor to claim the interest of the deceased in the continuing partnership: *Page v. Cox*, 10 Hare, 163. But an executor would seem to have the option to become a partner or not, as he sees fit, and has a reasonable time within which to elect: *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295; and a single act may amount to an election: *Edwards v. Thomas*, 66 Mo. 468, 481.

Continuation Under Direction in Will.—The rule is equally well settled that a partnership may be continued after the death of one of its members under a direction to that effect contained in the deceased partner's will: *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec.

111; *Burwell v. Mandeville*, 2 How. 560; *Davis v. Christian*, 15 Gratt. 11; *Exchange Bank v. Tracy*, 77 Mo. 594; *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266. But the provision in the will must show clearly an intention on the testator's part to have the partnership continue. The authority must be distinct and positive, as was held in *Kirkman v. Booth*, 11 Beav. 273; *Berry v. Folkes*, 60 Miss. 576. Hence, a power given to an executor to invest funds at his discretion confers no authority to continue the testator's estate in a mercantile firm, where the will contains no reference to the partnership: *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305. And a direction to an executor to use the property given him in trust in the partnership business until it was needed for distribution was held to confer no power to delay the settlement of the partnership affairs and payment of the firm debts: *In re Clapp*, 2 Low. 168, Fed. Cas. No. 2783.

A mere direction in the deceased partner's will does not constitute a contract. The surviving partners are not required to assent to it, and may stand on their legal rights and insist on a dissolution. Hence, in order to make the direction binding upon them their assent is required: *Davis v. Christian*, 15 Gratt. 11; *Exchange Bank v. Tracy*, 77 Mo. 594; *Wilson v. Simpson*, 89 N. Y. 619. There must be, in effect, an agreement between the survivors and the personal representatives of the deceased partner: *White v. Gardner*, 37 Tex. 407. This marks the principal difference between a continuance of the partnership in accordance with the partnership agreement and under a direction in the will. In the first case, as has been seen, the surviving partners are bound by their agreement, while in the latter case, their assent is necessary: See *Downs v. Collins*, 6 Hare, 418. This right to assent or not to the direction in the will would appear to be mutual, and an executor is entitled to exercise his option to continue the partnership business: *Phillips v. Blatchford*, 137 Mass. 510, 515. The assent of the surviving partners, however, renders the direction in the will obligatory on the executor, at least to some extent: *Burwell v. Mandeville*, 2 How. 560. But this does not mean that the executor cannot decline to act as a partner, only if he does decline the surviving partners may be entitled to damages: *Phillips v. Blatchford*, 137 Mass. 510, 515. As was said in *Berry v. Folkes*, 60 Miss. 612: "It would be a strong case, indeed, in which the court would compel a continuation of a partnership in which the estate of a decedent was interested, against the wishes of its representative." One reason why an executor or administrator is allowed such option is because he becomes personally liable for the debts of the partnership if he carries on the business with the surviving partners: *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703; *Wild v. Davenport*, 48 N. J. L. 129, 57 Am. Rep. 552, 7 Atl. 295. He is liable personally if he actively engages in the conduct of the business: *Citizens' Mut. Ins. Co. v. Ligon*, 59 Miss. 305. And it would be manifestly unjust to subject him to personal lia-

bility against his will. The executor can carry on no partnership business other than the one in which the deceased was interested. He cannot enter a partnership composed of different members, or change the original partnership agreement so as to extend the powers of the partners or the character of the business. He is limited to the precise partnership which existed at the moment of his testator's death: *Berry v. Folkes*, 60 Miss. 576, 611; *Alexander v. Lewis*, 47 Tex. 481; *Smith v. Ayer*, 101 U. S. 320. His power includes the right to dissolve the partnership: *Berry v. Folkes*, 60 Miss. 576.

Liability of Decedent's Estate.—A testator has the power to make his entire estate liable for the debts of a partnership of which he was a member, and which is to continue after his death: *Davis v. Christian*, 15 Gratt. 11; *Laughlin v. Lorenz*, 48 Pa. St. 275, 86 Am. Dec. 592. He may bind either his entire estate or only that portion which is already embarked in the partnership business: *Burwell v. Mandeville*, 2 How. 560; *Davis v. Christian*, 15 Gratt. 11; *Jones v. Walker*, 103 U. S. 444. Generally speaking, only such assets as are already invested in the partnership are subject to liability when the partnership is continued either under articles of agreement or under a direction in the will. The intent must be clear, in order to bind the general estate of the deceased: *Pitkin v. Pitkin*, 7 Conn. 307, 18 Am. Dec. 111; *Stewart v. Robinson*, 115 N. Y. 328, 22 N. E. 160, 163; *Cook v. Administrator*, 3 Fed. 69. The general estate will not be liable for the debts of the partnership, unless it appears unequivocally that the testator intended it to be bound: *Brasfield v. French*, 59 Miss. 632. Justice Story forcibly stated the rule thus, in *Burwell v. Mandeville*, 2 How. 560: "Nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying at the same time that the payments may all be recalled, if the trade should become unsuccessful or ruinous. Such a result would ordinarily be at war with the testator's intention in bequeathing such legacies and residue, and would or might postpone the settlement of the estate for a half century, or until long after the trade or continued partnership should terminate." A mere direction in the will that the partnership shall be continued after the testator's death always has the effect of limiting the responsibility of the estate to the funds already embarked in the business: *Davis v. Christian*, 15 Gratt. 11; *Burwell v. Mandeville*, 2 How. 560; *Alexander v. Lewis*, 47 Tex. 481; *Cook v. Administrator*, 3 Fed. 69; *Stewart v. Robinson*, 115 N. Y. 328, 22 N. E. 160, 163; *Wilcox v. Derickson*, 168

Pa. St. 331, 31 Atl. 1080; Vincent v. Martin, 79 Ala. 540; Steiner v. Steiner etc. Co., 120 Ala. 128, 26 South. 494. The rule seems to be somewhat more lax in cases of partnership organized with shares of stock, where the partnership agreement provides for a continuation of the relation: Blodgett v. American Nat. Bank, 49 Conn. 9; Phillips v. Blatchford, 137 Mass. 510. There would appear to be no reason for such a distinction, and it was given no weight in Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080.

A Court of Equity May Treat the Partnership as a Continuing One under certain circumstances, even in the absence of an express provision to that effect either in the articles of copartnership or in the will of the deceased partner. Such a case occurs when it is necessary to provide for the interests of the infant children of the dead partner. Thus, it has been held that a court of equity has power to authorize the continuance of a partnership, after the death of one of the partners, in behalf of the infant children of such deceased partner: Powell v. North, 3 Ind. 392, 56 Am. Dec. 513, and extended note on the subject to the case. To the same effect see Thompson v. Brown, 4 Johns. Ch. 619. In Young v. Scoville, 99 Iowa, 177, 68 N. W. 670, a court of equity was held to have properly exercised its power in treating a partnership as a continuing one, and settling it as if there had been no dissolution, where, after the death of a female partner, her husband and the survivor continued the business of the firm just as they had done before her death. The court here said that "a court of equity will undertake in this kind of a case to do justice without reference to any settled, fixed, and inflexible rule": See, also, Robinson v. Simmons, 146 Mass. 167, 4 Am. St. Rep. 299, 15 N. E. 558.

Mining Partnerships form an exception to the general rule that death dissolves such a relation. Regret has been expressed that the courts have gone to the extent they have in excepting such partnerships from the general law of partnerships. But the rule is now well established "that in such partnerships there is usually no *delectus personae*, and from this difference many peculiarities arise, the principal of which is that the partnership is not dissolved by the death of a partner": Taylor v. Castle, 42 Cal. 367; Jones v. Clark, 42 Cal. 180; Patrick v. Weston, 22 Colo. 45, 43 Pac. 446.

LAND TITLE AND TRUST COMPANY v. NORTHWESTERN NATIONAL BANK.

[196 Pa. St. 230, 46 Atl. 420.]

BANKS AND BANKING—FORGED CHECKS—LIABILITY FOR PAYING.—Generally, a bank is not bound to know the signature of the indorser of a check, and if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid if it proceeds promptly on the discovery of the fraud. But in order for the bank to recover, it must appear that it has sustained a loss, and if it can charge the payment to the account of the depositor, it has lost nothing, and has no cause of action.

BANKS AND BANKING—PAYMENT OF FORGED CHECK—LIABILITY.—A bank is not liable for the payment of a check on a forged indorsement when the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named.

BANKS AND BANKING—FORGED CHECKS—RIGHTS OF PARTIES.—The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank paying his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check arises from his implied warranty of the indorsement, and is founded on contract, and not on negligence.

R. C. Dale and A. Moore, for the appellant.

J. G. Johnson, for the appellee.

232 **FELL, J.** The fraudulent transaction which gave rise to this litigation may be briefly stated. Dr. Herman S. Bissey was the owner of premises No. 2352 North Broad street, Philadelphia, which he wished to sell. A man who gave his name as Ashley called on Dr. Bissey, and under the pretense of desiring to purchase the property, got possession of the title papers, and took them to a responsible conveyancer, to whom he applied for a loan of five thousand dollars, to be secured by a mortgage of the property. The conveyancer, believing the man to be Dr. Bissey and the owner of the premises, negotiated the loan. The mortgagee, desiring title insurance by the Land Title and Trust Company, deposited with it the amount of the loan, to be paid to the mortgagor when a valid mortgage should be executed. When the matter **233** was ready for settlement Ashley went with his conveyancer to the office of the company and was there introduced to the settlement clerk as Dr. Bissey. He signed the mortgage, "Herman S. Bissey," acknowledged it before a notary connected with the company, and re-

ceived from the clerk the company's check drawn on itself to the order of Herman S. Bissey. This check, indorsed Herman S. Bissey, was deposited in the Northwestern National Bank by a person who had opened an account with it as G. B. Rogers, and was collected by the bank of the trust company in the usual course of business. Whether Ashley and Rogers were the same person or different persons who had conspired to defraud the trust company and had opened an account with the bank as a means to that end, or whether Rogers was a person who was innocent in the matter, did not appear at the trial. Dr. Bissey had no knowledge of the mortgage until called on six months later for the interest. All of the parties to the transaction except Ashley and possibly Rogers, if he were a different person, acted in good faith and in that reliance on the good faith of others which is usual in such matters. Ashley, by some means, induced a well-known and reputable conveyancer to believe that he was Dr. Bissey. The business followed the usual routine by which hundreds of such transactions are carried on every day, and nothing occurred during its course to put the other parties on their guard. On discovering the fraud which had been practiced upon it, the trust company notified the bank and demanded the return of the money paid on the check, and on the refusal of the bank brought this suit. At the trial a verdict was directed for the plaintiff.

The case as presented by the plaintiff's declaration is that of the payment by the plaintiff of a check drawn on it by a depositor to the order of a third person whose indorsement was forged, the payment having been made in reliance upon the subsequent indorsement of the defendant, the ground of liability being that the defendant by its indorsement and presentation warranted the genuineness of the indorsement of the payee, Herman S. Bissey. While by this statement of the case the trust company is considered as a banker only, whereas in fact it was both the banker and the drawer of the check, it fairly presents the fundamental question involved. A recovery must be had on the ground alleged or not at all.

234 Generally, a bank is not bound to know the signature of the indorser of a check, and if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid if it proceeds promptly on discovery of the fraud. This is upon the principle that the indorsement of a check is an implied warranty of the genuineness of the previous indorsements. But in order that a bank may recover it must appear

that it has sustained a loss. If it can charge the payment to the account of the depositor, it has lost nothing, and has no cause of action. The question is, then, the same whether we consider the check as having been drawn by an ordinary depositor in the trust company or as having been drawn, as it was, by the real estate department of the company on the banking department. While, as between the bank and the trust company as a banker, the former is bound by its implied warranty of the indorsement, still there is no cause of action unless the payment of the check was not as against the drawer of the check a good payment. The reason of the rule that when a bank pays a depositor's check on a forged indorsement, or a raised check, it is held to have paid it out of its own funds and cannot charge the payment to the depositor's account, is that there is an implied agreement by the bank with its depositor that it will not disburse the money standing to his credit except on his order. The rule applies where a check has been lost or stolen and the payee's name has afterward been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: 1. Because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used; the bank is deprived of the protection afforded by the fact that a bona fide holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks; there is thrown upon the bank the risk of antecedent fraud practiced upon the ²³⁵ drawer of the check, of which it has neither knowledge nor means of knowledge; 2. Because in such a case the intention with which the drawer issued the check has been carried out; the person has been paid to whom he intended payment should be made; there has been no mistake of fact except the mistake which he made when he issued the check, and the loss is due not to the bank's error in failing to carry out his intention, but primarily to his own error into which he was led by the deception previously practiced upon him.

It is somewhat surprising that the question presented by this case has not arisen more frequently. There are but few decisions upon it, and none in this state. But the views which we have expressed are in entire harmony with the principles which we have recognized as governing the decision of cases arising from the forgery of notes and checks and involving kindred questions. Among the more recent of these is *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. St. 47, 28 Atl. 197, in which the cases are reviewed by our brother Mitchell, and it is said by him: "It is always a good defense that the loss complained of is the result of the complainant's own fault or neglect, and it would require a statute in very explicit terms to do away with so universal a principle of law founded on so incontestible a principle of justice."

In *Bank of England v. Vagliano Brothers* (1891), L. R. App. C. 107, the bank had been induced to pay by notice from Vagliano Brothers of the drawing and acceptance of the draft, and as the case differs from this in that important particular it cannot be cited as a precedent. But the opinions of the lords are instructive on the questions involved in this case, and the principles announced by them would settle the contention in favor of the defendant. Lord Selborne said: "It is not, as I understand, disputed that there might, as between banker and customer, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another."

There are, however, decisions in other states which are directly ²³⁶ in point. In *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360, 57 Am. Rep. 171, 10 Pac. 141, the facts are almost identical with those in this case. An unknown person, representing himself to be Guernesy, who was the owner of a quarter section of land, obtained from Shotwell a loan secured by mortgage on Guernesy's land, and received from Shotwell in payment a draft drawn to the order of Guernesy. He indorsed Guernesy's name on the draft and sold it to the bank. In an action by Shotwell to recover of the bank the amount received by it on the draft, it was held that, although Shotwell was deceived in the transaction, the person with whom he dealt was the person intended by him as the payee of the draft, designated by the

name he assumed in obtaining the loan, and that his indorsement was the indorsement of the payee named. It is said in the opinion: "The vital point in this case is that Shotwell intended the draft to be sent to the party executing the notes and mortgage, and intended it to be paid to the person to whom he sent it, and whom he designated by the name of Daniel Guernesey, because that was the name he assumed in executing the notes and mortgage; and therefore the National Bank is protected in paying the draft to the very person whom Shotwell intended to designate by the name of Daniel Guernesey." In *Maloney v. Clark*, 6 Kan. 82, the plaintiff was induced to send a draft drawn to the order of his brother to a stranger who in the correspondence had personated his brother. The stranger indorsed the name of the plaintiff's brother on the draft, and sold it to the defendants, who were bankers. It was held that under these facts the plaintiff could not recover.

In *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619, a person who assumed the name of Barney took to Coleman, an auctioneer, a stolen horse and buggy to be sold. Before selling them Coleman made inquiry and received a favorable report of the standing of the real owner of the assumed name. After the sale he gave a check drawn to the order of Barney to the person for whom he sold the team, who indorsed it and parted with it for value. Payment of the check having been stopped, suit was brought by the holder against Coleman and a recovery had. In the opinion it was said: "It is clear from the facts that although the defendant may have been mistaken in the sort of man the person they dealt with was, this person was intended by them ²³⁷ as the payee of the check, designated by the name he was called in the transaction, and his indorsement of it was the indorsement of the payee of the check by that name." It would follow under this reasoning that if the check had been paid by the bank it would have been a good payment. In the case of *United States v. National Exch. Bank*, 45 Fed. 163, decided by the circuit court of the United States for the eastern district of Wisconsin, it was held that a bank was not liable for the payment of a check on a forged indorsement where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check and whom he believed to be the payee named. Shuman had by fraud obtained possession of a postoffice money order drawn in favor of Erben, on which he forged Erben's indorsement, and in payment of the order received a check from

the postmaster drawn on the bank defendant to the order of Erben, on which he forged Erben's indorsement, and it was paid by the bank. This decision, as the others cited, is put upon the ground that the intention of the drawer of the check was that it should be paid to the person to whom he delivered it. There are a number of other cases which more or less directly recognize the principle on which these decisions are based, but in which there is no direct ruling on the subject, and we have found none which express a contrary view.

The facts of this case do not, we think, bring it within the rule that a bank paying a check to order on a forged indorsement may not charge the payment to the drawer's account, for the reason that the check was issued to the person whom the drawer intended to designate as the payee. If not within the rule, the plaintiff has no standing whatever. It is a perverted statement of the whole transaction to say that the check was intended for Dr. Herman S. Bissey, and that he alone was entitled to receive payment. Dr. Bissey had no more right to the check than had Ashley. He had given nothing for it. No one was entitled to it, and had the truth been known it would not have been issued. Under the supposed facts on which the trust company acted, Ashley was the owner of the property; he had executed a mortgage, and was entitled to payment. The clear intention was to pay him, although there was a mistake as to the facts on which the intention was based. Nor is the solution of ²³⁸ the question involved to be sought in determining whether the bank was negligent in dealing with its depositor Rogers. This was suggested at the argument, but mainly as a make-weight. The case was not presented or argued on that ground, and in view of the principles by which the question of liability must be determined and of the facts as shown at the trial, it could not have been. The true ground of liability, if any existed, was that the bank collected of the trust company a check drawn to the order on which the indorsement was forged. Between the bank and the trust company, as the drawer of the check, no relation, contractual or otherwise, existed. The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank which pays his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check arises from his implied warranty of the indorsement. This liability is founded

on contract, and not on negligence, and it exists, if at all, whether there was negligence or not. But if we consider the question in this light the plaintiff has no case. The fraud was in effect consummated when the check was delivered to Ashley. He would have received money instead of a check if he had asked for it, or he could have drawn the money in the banking department in an adjoining room. Any right of the trust company to recover must rest on the assumption of its entire good faith and innocence; and if it gave a check to Ashley with any reservation or doubt as to his honesty in the transaction, it is estopped by the fact that it gave to one of whom it had reason to be suspicious the means of perpetrating a fraud on others. The officers of the trust company of course had no doubt. They acted in entire good faith, and it may be conceded with ordinary prudence; but the loss was occasioned by their error, and there is no reason, legal or equitable, why it should be shifted to another.

The judgment is reversed.

MR. CHIEF JUSTICE GREEN and Mr. Justice Dean dissented, and the latter said: "There is no dispute as to the facts; the court below directed the jury to find for plaintiff, and we have this appeal by the National Bank, defendant, assigning as error the peremptory instruction of the court below. A majority of my brethren are of opinion the court erred. I think it was right. I put the case wholly upon the principle or rule that where one of two innocent persons must suffer by the wrong of a third, he shall stand the loss whose fault or neglect made the loss possible. . . . The fraud was only possible in view of the undisputed facts, because of the childish credulity and consequent neglect of the most ordinary business precautions of the defendant. I would affirm the judgment."

BANKS—PAYMENT OF FORGED CHECKS.—Money paid upon a forged indorsement of a check or draft may be recovered back. The bank is not bound to know the signature of an indorser. And the holder, whether he indorses the instrument or not, warrants the genuineness of all prior indorsements. If, therefore, a check or draft upon which the name of a prior indorser has been forged is paid, the amount may be recovered back from the party to whom it has been paid, or from any party who indorsed the instrument subsequently to the forgery: See the monographic notes to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 898; *Laborde v. Consolidated Assn.*, 39 Am. Dec. 522.

HERTZLER v. GEIGLEY.

[196 Pa. St. 419, 46 Atl. 366.]

AGENCY—DEFENSE OF ILLEGALITY OF CONTRACT.—An agent who has sold goods for his principal, collected the proceeds, and refused to turn them over cannot defend against the claim of his principal thereto on the ground that the sales were made without a license, and therefore illegal.

CONTRACTS—ILLEGALITY—DEFENSE.—An illegal contract cannot be executed, but when it has in fact been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin.

AGENCY—ILLEGALITY OF TRANSACTION AS DEFENSE. If money has been actually paid to an agent for the use of his principal, the legality of the action of which it is the fruit does not affect the right of the principal to recover it.

AGENCY—ILLEGALITY OF CONTRACT AS DEFENSE.—The law cannot enforce an illegal contract, but if the servant or agent of another has, in the prosecution of an unlawful enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction.

B. F. Davis and S. P. Eby, for the appellant.

A. B. Hassler, for the appellee.

421 GREEN, C. J. The plaintiff's statement of cause of action contains throughout a claim that the defendant was indebted to her for the proceeds of whisky belonging to her, but which he sold for her as her agent. The first clause alleged that the defendant was indebted to her for large quantities of whisky, which the defendant received from her agent and "sold for plaintiff and received the money or proceeds of said sales from time to time." The second clause alleges "that from about July 20, 1894, to about March 24, 1895, the defendant sold and collected for sales of plaintiff's whisky and liquor, the sum of \$1,608.75, and from that time on until about August 1, 1897, the sum of \$734.06." The third clause charges that defendant "marked down the values of whisky or liquor he took away from time to time," representing the values of the whisky he received from her (plaintiff), "and which defendant had agreed to, or was to sell at said prices for the plaintiff as her agent or salesman." The fifth clause states that "the plaintiff allows the defendant the

sum of \$250, commission for said sales of said whisky or liquors, that being the amount or balance he is entitled to receive." Then follows a statement in items of the values of liquor taken away and sold by defendant for the plaintiff, amounting in the aggregate to \$2,342.81, "from which is deducted \$250 amount of defendant's commissions," leaving a balance due the plaintiff of \$2,092.81.

It will be perceived from this analysis of the plaintiff's statement of cause of action, that it is in no sense a bill for goods sold and delivered by plaintiff to defendant, but is exclusively a claim for moneys due by defendant to plaintiff, which were collected from third parties to whom defendant had sold the whisky as the agent of the plaintiff. On its face, therefore, it is a claim for money due from the defendant as agent, to the plaintiff as principal, collected by him for her and not paid over.

This being the correct legal aspect of the claim, the case is brought within a clear line of decisions, in which it has been held that the agent could not make defense against the claim on the ground that the sales were illegal because made without ⁴²² a license, or for any other cause of illegality. The authorities on this subject are very numerous, and in reality not controverted. A very few references will suffice. The controlling principle is well stated in the opinion of Chief Justice Gibson in the case of *Lestapies v. Ingraham*, 5 Pa. St. 71, thus: "True it is that an illegal contract will not be executed; but when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties, for a promise, express or implied, and the court will not unravel the transaction to discover its origin." A very full and exhaustive discussion of the whole subject is found in the opinion of Mr. Justice Wickham in the case of *Commonwealth v. Shober*, 3 Pa. Sup. Ct. 554. It was there said: "It is an elementary rule in the law of agency, applicable alike in civil and criminal proceedings, that the agent shall not be heard to deny the title of his principal. This rule is founded on reason, public policy, and common honesty. Nor does it matter whether the goods or money retained or embezzled by the agent came to his hands through transactions tainted with illegality. 'The contract of the agent to pay the money to his principal is not immediately connected with the illegal transaction, but it grows out of the receipt of the money for his principal': Story on Agency, sec. 347. 'If money has been actually paid to an agent

for the use of his principal, the legality of the action of which it is the fruit does not affect the right of the principal to recover it. . . . The agent whose liability arises solely from the fact of having received money for another's use can have no pretense to retain it': Dunlap's Paley's Agency, 62. 'While the law will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to his master, he is bound to turn it over to him and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction': Wood on Master and Servant, sec. 202. 'An agent who has in his hands money belonging to his principal, on a closed or terminable account, cannot set up as a defense to an action by the principal for money had and received the illegality of a part or the whole of the transactions': Wharton on Agency, secs. 26, 250; Mechem ⁴²³ on Agency, sec. 526; 1 Am. & Eng. Ency. of Law, 2d ed., 1088. . . . The rule thus announced by all the leading writers on the subject of agency, as well as by all the authors of textbooks on criminal law who have touched on the subject, is no longer open to doubt." The same doctrine was again enforced in *Elder v. Corr*, 9 Pa. Sup. Ct. 228. The syllabus of the case is: "A man holding a warehouse certificate for ten barrels of whisky, as collateral security for a debt, sold the collateral for cash. The vendee tortiously converted the property to his own use and refused to return the certificate or pay for the whisky. Held, in an action of trespass, that defendant could not set up the defense that the owner of the certificate was not a licensed vendor of liquor who had paid a government tax as a wholesale dealer." In the opinion of Judge Orlady, it was said: "As to the second proposition, that the court will not enforce the contract because it is against public policy, we do not agree with the appellant in his application of the principle. The decisions are uniform from *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682, to *Phoenix Silk Mfg. Co. v. Reilly*, 187 Pa. St. 526, 41 Atl. 523, that the courts will not aid a party in an action on an immoral or illegal act. But we find no case which holds that a defendant who fraudulently receives property is protected by the law, and relieved from any liability to return or pay for it, or that the plaintiff is limited to the simple action of assumpsit in recovering its value. A defense of this nature was urged in *Commonwealth v. Shober*, 3 Pa. Sup. Ct. 554, and it was held by this court to be insufficient: See, also,

Blakeslee Mfg. Co. v. Hilton, 5 Pa. Sup. Ct. 184. We do not think the facts in this case bring it within the prohibition of the state or federal statutes: Rahter v. First Nat. Bank, 92 Pa. St. 393." It is not necessary to multiply the authorities.

In the present case, the facts were that the whisky was delivered to the defendant by the plaintiff's husband acting as her agent, who had a distillery as well as a revenue license, and it is extremely doubtful, to say the least, that there was any illegality whatever in the transaction. But however that may be, the defendant cannot set up any such defense, even if the want of a license by the plaintiff would have otherwise vitiated the transaction. The learned court below, not at all controverting the foregoing authorities, or the principle they establish, ⁴²⁴ but fully conceding their correctness, was of opinion they were not available for the plaintiff, on the ground that there was no evidence to establish the alleged agency of the defendant for the plaintiff, and consequently he withdrew the case from the jury and granted a compulsory nonsuit at the end of the plaintiff's testimony. After a careful examination of the whole of the testimony we are unable to agree with the court upon this subject. In point of fact, the plaintiff did not herself make any contract or any deliveries to the defendant. The whole business was transacted on her part by her husband, who was acting as his wife's agent in caring for and disposing of the whisky in question. He was examined as a witness and he testified as follows: "Q. Upon what condition did he get the whisky? How did he get it and how was he to pay for it, and was there any commission allowed him? A. Yes, I promised him that if he would sell fifty barrels I would give him \$250 for his share. We had been dealing for a year or so before I failed. Q. For every fifty barrels he would sell, you would allow him \$250? A. Yes. Fifty barrels represented \$1,500."

Another witness, Miles Roth, who was the distiller at the distillery was examined and testified thus: "Q. You were the distiller at the time Mr. Hertzler carried it on? A. Yes, sir. Q. The time they lived there, were you? A. Yes, sir. Q. During that time did you notice whether since 1894 Mr. Geigley used to fetch whisky there? A. Yes, sir. Q. More than once? A. I don't understand that right. Q. Whether he took whisky away from the retail house? A. Yes, he was an agent for Hertzler. Q. To sell whisky, was that it? Did you see Mr. Geigley fetch away whisky from the distillery after 1894, after the sheriff's sale? A. Yes. Q. How often did

you see him there, about? A. About well, probably, perhaps, every two weeks. Sometimes every four weeks. I couldn't exactly say how often. Sometimes not, perhaps, for a whole month. Q. Did you ever measure it out for him when Mr. Hertzler was not there? A. Yes, sir. Q. How much did he fetch away as near as you can recollect the time you measured it out for him? A. Sometimes he fetched away from sixteen to thirty-five gallons and sometimes not so much."

It is perfectly manifest from a mere inspection of the figures of the account, and from the testimony as to the frequency ⁴²⁵ and quantity of the items of whisky which were obtained by the defendant from Hertzler, that he was not buying the whisky for his own use, but for the purpose of selling it to others. When both Hertzler and Roth testified that the defendant was acting as an agent in these transactions, it is very clear that they truthfully characterized his position in the matter. There is not the slightest contradiction of the testimony of these witnesses, and their statements are corroborated by the manner in which the account was kept, and the plain indications afforded by the figures, and the mode in which the defendant obtained his supplies of whisky. Hertzler testified that he did not keep the account of the defendant in the day-book, as he kept all his other accounts, but that he would get from the defendant his figures representing the deliveries and the prices, and copy it off in a small book. He said: "The reason I kept Geigley's account in that way I always kept it on his book, and I had the dates and everything marked down. Then I kept my account just temporary in that little book; I took off his account. He has the dates and cash all fixed here, as he fetched them. Q. The sales represented in this book were put down at the time you made them? A. Yes. Always copied off of his account." It is difficult to understand this method of keeping the account of the transactions with the defendant upon the theory that they were direct sales to him at fixed prices, or upon any other theory than that they represented sales made by the defendant for the account of the plaintiff. Such is the tendency of the testimony, and when it is accompanied with the positive testimony of two witnesses, who were not contradicted to the fact that the defendant was acting as the agent of the plaintiff in selling the whisky, it is not correct to say there is no evidence on the record to establish the agency. That question was one of fact; the evidence distinctly supported the alle-

gation of the agency of the defendant and therefore it should have been submitted to the jury for their action.

The assignments of error are sustained.

Judgment reversed and new venire awarded.

ILLEGAL CONTRACT.—MONEY PAID TO A THIRD PERSON for the use of the plaintiff may be recovered from such person, though the money is the proceeds of an illegal transaction: *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; monographic note to *Boyd v. Barclay*, 34 Am. Dec. 767.

ILLEGAL CONTRACT.—MONEY RECEIVED BY AN AGENT for his principal, on an illegal contract, may be recovered by the principal: See the monographic note to *Lemon v. Grosskopf*, 99 Am. Dec. 63, 64. Compare pages 66 and 67 of the same note.

WINTHROP COMPANY v. CLINTON.

[196 Pa. St. 472, 46 Atl. 435.]

WILLS—SPENDTHRIFT TRUSTS—MEANING OF “SUPPORT.”—A gift for the “support” of a son contained in a spendthrift clause of a will means a gift for his personal or physical subsistence or maintenance.

WILLS—SPENDTHRIFT TRUSTS.—It is not essential that a spendthrift trust contained in a will should contain words providing specifically that the income shall not be subject to the debts or liabilities of the cestui que trust.

WILLS—SPENDTHRIFT TRUSTS.—A gift by a testator of his estate to his executors to pay the net income to his son “for his use and support for and during all the term of his natural life, and not to be liable to anticipation, and his receipt alone to be the sole discharge” to the trustees, with a gift over after the son’s death, creates a spendthrift trust in favor of the son, free from the claims of his creditors.

J. G. Johnson and S. M. Hyneman, for the appellant.

R. S. Smith and C. E. Morgan, Jr., for the appellee.

473 GREEN, C. J. The whole question in this case is, whether a testamentary provision in the will of a father in favor of a son is to be treated as a spendthrift trust, so as to defeat the claim of an attaching creditor of the son to the income of the fund in question. The words of the will upon which the controversy arises are a part of the fifth clause which disposes of the residue of the testator’s estate. After providing that the executors shall let and demise all the real estate, and invest all the personal estate upon good securities, the will directs the execu-

tors to hold all the net proceeds of the income in trust, "to pay the whole net income thereof quarter yearly to my said beloved wife, Louisa A. Clinton, into her own hands for her separate use and maintenance during all the term of her natural life and ⁴⁷⁴ not to be liable to anticipation, and her receipt alone to be the sole discharge to my said trustees, and from and immediately after the decease of my said wife, Louisa A. Clinton, then my said trustees and the survivors and survivor shall pay said net income quarter yearly unto my son, Winfield A. Clinton, for his use and support for and during all the term of his natural life and not to be liable to anticipation, and his receipt alone to be the sole discharge to my said trustees, and from and immediately after the decease of my said son, Winfield A. Clinton, then my said trustees and the survivors and survivor shall pay said net income quarter yearly unto Blanche Clinton (the present wife of said Winfield A. Clinton) if she be then living for her use and support during all the term of her natural life and not to be liable to anticipation, and her receipt alone to be the sole discharge to my said trustees, and after the decease of my said wife and both the said Winfield A. Clinton and Blanche Clinton, his present wife, then in trust to pay over, assign, grant, and convey the whole principal of my said residuary estate unto the lawful child or children of my said son, Winfield A. Clinton, by his said present wife, Blanche Clinton, who may be then living and their lawful issue in equal shares as tenants in common."

The testator, Edwin Clinton, died in September, 1892, and his widow, Louisa A. Clinton, died in January, 1896. The son, Winfield A. Clinton, is still living, and the present proceeding is an attachment in execution upon a judgment obtained by the plaintiff against the said Winfield A. Clinton, November 27, 1897, for fifteen hundred and seventy-six dollars and forty-eight cents. Interrogatories having been served upon the executors as garnishees, they answered, saying that they had in their hands at the time of making answer sixteen hundred and sixty-four dollars and seventy-three cents, as income held by them as trustees under the will, but that they are advised and informed that the said income was held as a spendthrift trust in favor of the said Winfield A. Clinton and is not subject to attachment or execution for his debts or liabilities. The learned court below held that the income of the fund was the absolute property of Winfield A. Clinton, and was not protected as a spendthrift trust from the claims of his creditors, and awarded a judgment

against the garnishees, from which judgment the present appeal is taken. We are unable ⁴⁷⁵ to agree with this decision of the court below for reasons which are of convincing force to our minds.

It must be observed that the provision in favor of the cestui que trust, Winfield A. Clinton, is one of three provisions, all of a similar character, and manifestly intended to accomplish the same purpose. They are all dispositions of the same fund, to wit, the net income of the residuary estate, and it cannot be doubted that the animating purpose of the whole was the support and maintenance during their respective lives of: 1. The testator's widow; 2. Winfield A. Clinton, his son; and 3. Blanche Clinton, the wife of his said son. Each of these beneficiaries was in turn to be supported during life by the use of this income. The importance of this consideration is to show that there was a common purpose moving the mind of the testator to provide a means of physical subsistence for each of these, his natural beneficiaries, during the whole of their respective lives. So far, therefore, as the ultimate determination of the question depends upon the intention of the testator to accomplish this definite object, it may be assumed that this was his sole motive and purpose. As will be hereafter seen, this intent is always regarded by the courts as an important factor in the contention, and in some cases, as a controlling feature, when the usual words to create a spendthrift trust are entirely absent from the will.

But, in addition to this general indication of the testator's intent, let us give our attention to the precise language of the will creating the trust. Recurring to the fifth clause of the will, we find that as to the first beneficiary, the widow, the provision is "to pay the whole net income thereof quarter yearly to my said beloved wife, Louisa A. Clinton, into her own hands for her separate use and maintenance during all the term of her natural life, and not to be liable to anticipation, and her receipt alone to be the sole discharge of my said trustees." We think it will hardly be contended that this provision in favor of the widow was not adequately protected against the claims of any creditors she might have. But, without elaborating that subject, the immediately following provision, and it is part of the same sentence, is, "and from and immediately after the decease of my said wife, Louisa A. Clinton, then my said trustees and the survivors and survivor shall pay said net income quarter ⁴⁷⁶ yearly unto my son, Winfield A. Clinton, for his use and

support, for and during all the term of his natural life, and not to be liable to anticipation, and his receipt alone to be the sole discharge to my said trustees." The only difference between this provision and the one immediately previous in favor of the wife is, that the latter contains the words "into her own hands for her separate use and maintenance," and in the second provision in favor of the son the words are "unto my son, Winfield A. Clinton, for his use and support." But a payment "into the hands" of his wife is precisely the same thing in every legal sense as a payment "unto my son, Winfield A. Clinton." And the words "separate use and maintenance," of his wife have no different meaning than the words "use and support" of his son. The third provision for the son's wife is in the same words, "use and support." Now, not only for the purpose of fixing a testamentary intent by the use of words of similar meaning, but for the more important purpose of fixing such intent by the general meaning of the word employed in the son's case, to wit, "support," let us determine its meaning, and hence the testator's meaning, by ascertaining the received meaning of the word in general use. The word "maintenance," in the wife's case, speaks for itself, and needs no interpretation. The word "support" is defined by Worcester as, "Sustenance; maintenance; subsistence; sustentation; livelihood; living." The same lexicographer defines the word "maintenance" as "supply of the necessities of life; sustenance; subsistence; livelihood; support." In 24 American and English Encyclopedia of Law, page 706, the word "support" is thus defined: "Support. The word 'support' is generally used to mean articles for the sustenance of the family, as food," etc. Among the authorities cited in the footnotes is this: "In a devise, a direction to 'provide a good and sufficient support' to the wife of the testator's son was construed to mean such sum as is proper for a mother and the head of a family having a fortune and station held by her husband and her children: *Jacobus v. Jacobus*, 20 N. J. Eq. 49." In Anderson's Dictionary of Law, page 994, the word is defined thus: "Support; sustenance; maintenance."

The writer has been more particular as to the meaning of this word than he would otherwise have been, because the ruling of the court below was based principally upon the decision ⁴⁷⁷ of this court in the case of *Girard Life Ins. etc. Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513, where the income was directed to be paid over to the cestui que trust "for his own use and benefit." Now the word "benefit" is a much broader

word than "support," and has no such limited meaning as the latter word. It is thus defined in Worcester: "Advantage; gain, profit"; and its manifest signification is anything that works to the advantage or gain of the recipient. With this meaning a fund which is to be paid to a cestui que trust for his own use and benefit is absolutely his own, as was held in the case referred to, and therein lies the difference between that case and this. There were also other elements in that case which affected the decision, but which are not present here.

Having thus ascertained that the testator meant that the net income now in question was to be paid to his son "for his use and support," and that this necessarily imports that his son shall be constantly provided during his whole life with the means to obtain for himself those things which are essential to his personal, physical subsistence, the way is made quite clear to a ready solution of the question under consideration and to an easy review of the decisions of this court on this subject. For instance, if the income is to be paid to the cestui que trust for his personal, physical support and maintenance, it is manifest that if it is made subject to the claims of creditors, the whole plan and purpose of the testator is frustrated. It is too clear for argument that he could not possibly have intended that the means of subsistence which he had thus provided for his son should be subject to seizure by his creditors, thus depriving not only himself, but his wife and family, of the necessary means of living. It is not essential that a spendthrift trust should contain words providing specifically that the income shall not be subject to the debts or liabilities of the cestui que trust, and this appears by a number of the decided cases. *Stambaugh's Estate*, 135 Pa. St. 585, 19 Atl. 1058, was a remarkable instance of the absence of any such words, or of any of the words ordinarily used to create a spendthrift trust. The present case is infinitely stronger in all its features than that. The words of the will were: "And from the other aforesaid dividend share of my estate all the just debts and claims that I have and hold against my son Moses Stambaugh are to be subtracted from the ⁴⁷⁸ same, and the balance thereof is to be placed in the hands of Henry Shaffer of Jackson township, whom I hereby appoint trustee for to hold the said sum for my son Moses Stambaugh. The said Henry Shaffer is to pay the interest yearly accruing from the same to my son Moses Stambaugh, after deducting taxes and necessary expenses, and after the death of my son Moses Stambaugh I bequeath the princi-

pal to the heirs of my son Moses Stambaugh, share and share alike." It will be seen that in the words used to designate the interest that Moses Stambaugh should have in the income, there is not a word which derogates in the least degree from an absolute ownership of the money to be paid him. Chief Justice Paxson, delivering the opinion, said: "Is this a spendthrift trust? It may be admitted that it lacks some of the usual provisions of such a paper, notably the absence of any clause protecting the income from attachment, etc. If, however, we can gather from the will itself, and from the light of the circumstances surrounding the testator, at the time he made it, that his intent was to create a spendthrift trust, such intent ought not to be defeated because his conveyancer blundered. . . . When we come to examine this will, we find that as to several of the legatees, children of deceased sons, the legacies are given absolutely. This is so even as to the females whose shares a testator is more likely to place in trust than those of male legatees. But when it comes to the shares of his two sons, Nathaniel and Moses, he places their shares in trust in precisely the same terms. We have no concern with Nathaniel's share, and it is referred to incidentally in ascertaining the intent of the testator. The latter had certainly some object in creating this trust for Moses. What was it? We do not think the answer difficult. The mere fact of the gift only of the income, and the interposition of a trustee implies distrust of his son. . . . He was providing for an insolvent son; and in view of the circumstances surrounding him at the time, who can doubt that he intended this as a spendthrift trust? This intent is not to be set aside because it is not clearly expressed by his scrivener." Nearly all of the foregoing language is applicable to the present case. The testator gave the other shares of his estate directly to his other children. He certainly had a purpose in giving this son's share in trust, and for his support during the whole of his life.

479 The only theory consistent with the provision in favor of this son, and also with the very words of the trust, is that he intended to provide a permanent means of support for his son and his family, so that they could not be deprived of it by any creditors, or by any persons claiming by way of anticipation. And this intent is much strengthened also by the provision that his son's receipt alone shall be a discharge to the trustees. He certainly did not mean that the receipt of an attaching creditor should be a discharge. For all these reasons and others that could easily be assigned we are clearly of opinion that the

testator intended to create a spendthrift trust for the protection of his son.

The case of *King's Estate*, 147 Pa. St. 410, 23 Atl. 603, so much relied upon both by the court below and appellee's counsel, has not the least analogy to the present case. The question of spendthrift trust was not involved in the case, and it was only referred to incidentally as a proposition that could not be applied to support the trust in that way. This was very obvious because the will provided that the whole income should be paid directly and unconditionally to the wife without qualification or restriction. Of course there was nothing to limit her absolute ownership, and there was also no feature of the will creating a spendthrift trust or making any provision against creditors or incurring debts.

But the case of *Smith v. Savidge*, 4 Pennypacker, 320, is a very strong authority in support of a spendthrift trust in the case at bar. There the provision was: "My son Levy is to have two thousand dollars out of my estate before a distribution is made, and I do appoint my son George as a committee for my son Levy to take charge of all of his money and pay him the interest, or so much of the principal that will give him a comfortable support, and after his death then his estate shall be equally divided between all his children." This court held that neither the principal nor the interest of the bequest to Levy was liable to attachment by his creditors. In distinguishing the case from *Park v. Matthews*, 36 Pa. St. 28, and *Girard Life Ins. etc. Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513, we said: "For here, as we have just shown, the expressed intention is the support of the donee, and for that reason both the principal and interest are to be used." This was an interpretation of the word "support" ⁴⁸⁰ which is direct authority for our present ruling upon the meaning of the same word.

In *Vaux v. Parke*, 7 Watts & S. 25, the trust was, "to pay the rents, issues and profits, interest and income arising therefrom into the proper hands of my son James, or to such person or persons, as he, by any order in writing, may for that purpose appoint." There was a proviso that the trustees might in their discretion convey the estate to the son in fee simple. It was held that the will created a good spendthrift trust against the claims of creditors. Sergeant, J., delivering the opinion, said: "Settlements of this kind by parents on their children have been of constant occurrence, and much property has thus been adjusted by will or deed. No case has ever decided that a trust

of this description can be annihilated by an execution against the cestui que trust."

In conclusion, it is only necessary to say that it would be utterly impossible to furnish continuing "support" for the whole life of a cestui que trust, out of an annual income fund, if that fund is to be held subject to the claims of creditors who may at any time take it from him by means of adversary proceedings. It is, therefore, a necessary inference that the testator had no such intent in this case, and hence it follows that his purpose was to establish a spendthrift trust in favor of his son. The assignment of error is sustained.

The judgment is reversed, and judgment is now entered in favor of the defendants, garnishees, upon their answer filed, the costs to be paid by the plaintiff.

SPENDTHRIFT TRUSTS are discussed at length in the monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697; *Smith v. Towers*, 9 Am. St. Rep. 405-408.

REYNOLDS v. NESBITT.

[196 Pa. St. 636, 46 Atl. 841.]

ATTACHMENT, FOREIGN—EFFECT OF DEATH OF DEFENDANT.—The death of the defendant in a foreign attachment before final judgment against him is obtained works a dissolution of the attachment.

E. G. Butler, for the appellant.

H. W. Palmer and G. W. Shonk, for the appellee.

637 **GREEN, C. J.** In this case a writ of foreign attachment was sued out by the plaintiff's testator, on July 9, 1890, against Lloyd W. Williams, a resident of Baltimore, Maryland, and Abram Nesbitt, **638** assignee of the Plymouth Savings Bank, as garnishee, in the common pleas of Luzerne county. The sheriff's return showed a service of the writ on the assignee on July 18, 1890, and nihil as to the defendant Williams. Reynolds, the plaintiff, died in August, 1890, and the defendant Williams died in November, 1897. The action was removed to the circuit court of the United States in January, 1891, but was remanded to the common pleas of Luzerne county on May 24, 1898, and thereafter, proper substitutions of legal representa-

tives of both parties having been made, the case was proceeded with in the common pleas of Luzerne county until a final judgment in favor of the plaintiff and against the defendant for twenty-nine thousand six hundred and ninety-three dollars and sixty-eight cents was entered on March 23, 1899. On May 5, 1899, a writ of scire facias was issued against the garnishee, and interrogatories were filed to which the garnishee filed answers on May 29, 1899. The garnishee admitted that he had filed his account as assignee of the bank, in which there was distributed to the estate of Lloyd W. Williams, deceased, fifteen hundred and twenty-nine dollars and eight cents, money in his hands as assignee, and that he had the receipt of the attorney for the estate of Williams for the whole amount. He further answered that as the defendant Williams had died before the judgment was obtained, all right of the plaintiff under the foreign attachment was absolutely defeated. The material question was thus raised whether the death of the defendant in the action before judgment was obtained dissolved the attachment. The court below held that it did, and discharged the rule for judgment, and thereupon the present appeal was taken by the plaintiff.

An examination of the authorities shows that this court has in repeated instances decided that the death of the defendant in a writ of foreign attachment, before final judgment against him was obtained, worked a dissolution of the attachment, and it was upon these decisions that the ruling of the court below was made.

Probably the earliest case in which this doctrine was declared was *Willing v. Bleeker*, 2 Serg. & R. 224. The writ was issued on February 6, 1808, and duly served upon the garnishees. On the same day the defendant petitioned for the benefit of the insolvent laws, and on August 19th following he executed a deed of general assignment for the benefit of all his creditors. A question arose whether certain duties owing to the United ⁶³⁹ States were entitled to a preference. At September term, 1808, judgment was obtained against the defendant for the debt in suit, and a scire facias against the garnishees was issued to June term, 1809. It was claimed by the United States that under an act of Congress of March 2, 1799, which provided that, in all cases of insolvency, certain debts due to the United States should have preference, the claim for duties should be preferred to the plaintiff's claim under the attachment. The court said, Tilghman, C. J.: "The assignment of August 19, 1808, falls

directly within the law. This is not disputed, but it is contended on the part of the plaintiff that the United States was entitled to no preference until the date of the assignment, prior to which he had obtained a lien on the property in the hands of the garnishees. It is to be considered, then, what kind of lien had been obtained by the attachment. That is the point on which the cause turns. An attachment transfers no property to the plaintiff. Its object is to compel the appearance of the defendant. That being obtained by entry of special bail, the attachment is dissolved. So likewise it would be dissolved by the death of the defendant before judgment though no bail were entered. And even when it is not dissolved, the goods are to remain in the hands of the garnishee on his giving security to answer their value, and after such security the property may be transferred to a stranger. The lien of the plaintiff, therefore, is of a special nature; it may eventually become absolute, but is liable to be defeated by various circumstances, without payment of his debt." The chief value of the foregoing citation is the ruling in relation to the nature and effect of an attachment, and its manifest application to the case of death of the defendant before judgment. If the attachment transfers no property, if it confers only a special kind of lien liable to be defeated in a number of ways, and particularly by the death of the defendant before judgment, then there is no reason to hold that, merely of its own force, it necessarily fastens itself upon the property of the defendant as soon as executed and cannot be divested of its hold by any subsequent events. It thus appears clearly that if any such events occur by which the attaching creditor is left merely in the position of an ordinary creditor who has commenced suit, and the defendant dies before judgment is obtained against him, of course he has no preference over the general ⁶⁴⁰ creditors in the distribution of the defendant's estate. Even if judgment had been first obtained there would be no lien upon anything but land. But the advantage which the plaintiff gained by his attachment was not of such a character that it could hold a preference against other creditors of its own force. The primary object being to compel an appearance, and that object being accomplished by the mere giving of bail, the hold upon the property attached is entirely gone. So that the process, in and of itself, is not the specific seizure or appropriation of the property attached, and there being no other claim upon the property attached to give a special preference to the attaching creditor, it necessarily follows

that upon the death of the defendant before judgment, the attaching creditor has no preference that can be enforced against other creditors, and hence in case of such death, the attachment is dissolved.

The next case in which the doctrine was announced was *Farmers' etc. Bank v. Little*, 8 Watts & S. 207, 42 Am. Dec. 293. It was there held that in foreign attachment against a corporation as defendant, the civil death of the corporation before judgment against it, produced by the decree of forfeiture of its charter by a judicial tribunal, dissolves the attachment. This is only another kind of illustration of the same doctrine announced in the preceding case. It was the death of a corporate body, instead of a natural person, but the same result logically followed, and the decision must be considered as a reaffirmance of the ruling in *Willing v. Bleeker*, 2 Serg. & R. 224. This appears very decidedly in the course of the opinion by Gibson, C. J., who said: "The judgment in the attachment suit establishes no more than the existence of the debt claimed by the attaching creditor from his immediate debtor; and the garnishee may therefore plead either that he owes nothing to anyone, or that the ownership of the debt demanded from him had passed from his immediate creditor by assignment when the attachment was laid, or that the attachment had been dissolved by his death before final judgment. . . . It never has been doubted that the defendant's death before final judgment dissolves the attachment. . . . But the primary intent being to procure an appearance, a foreign attachment is dissolved the instant the defendant has appeared or lost his capacity to appear, because the law expects not impossibilities; and this shows that the attaching creditor gains ⁶⁴¹ no property in the thing by laying the attachment. It is security for the defendant's appearance merely, and it is released as soon as the condition has been performed or becomes impossible." In the foregoing case, the attachment was issued in 1842, six years after the passage of the foreign attachment act of 1836, and the opinion was delivered in 1844, eight years thereafter, and this must be regarded as an answer to the contention that the act of 1836 made a change in this respect in the law as it was when the earlier decisions were made.

But the same doctrine was again announced in *Hays v. Locomotive Fire Ins. Co.*, 99 Pa. St. 621, where we said: "The civil death of a corporation before judgment in a foreign attachment against it dissolves the attachment, and the garnishee may take

advantage of this by pleading it, notwithstanding judgment had been entered of record after such death for default of appearance."

In Trickett on Liens, section 426, it is said: "When goods devolve on the executor or administrator, they cease to be subject to attachment; otherwise, the attaching creditor could disturb the order established by law for the payment of a decedent's debts. The defendant's death before final judgment dissolves the attachment. By analogy the dissolution of a corporation by a decree of forfeiture of its charter works the same result."

These citations establish the law in Pennsylvania on this subject with such effect that we could not now change it without overruling all of these authorities. We cannot discover any sufficient reason for doing so. We have examined and considered the very able argument of the learned counsel for the appellant with much care, but we are not convinced by it that there is any real occasion for now departing from a rule so well established as this appears to be, and we therefore feel obliged to hold that the assignments of error are not sustained.

Judgment affirmed.

A FOREIGN ATTACHMENT IS DISSOLVED by the death of the defendant before judgment: See the monographic note to Waitt v. Thompson, 80 Am. Dec. 142.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

ECROYD v. COGGESHALL.

[21 R. I. 1, 41 Atl. 260.]

DEEDS—CONDITIONS SUBSEQUENT—WHEN NOT CREATED.—A prohibitive clause in the habendum of a deed of land to a city, given for a valuable consideration, that “no buildings for any other municipal purpose than that of a city hall shall ever be erected on the granted premises,” does not, without any words of re-entry or forfeiture, create a condition subsequent. Hence, the title of the city is not liable to be divested on the happening of the event specified.

DEEDS—CONDITIONS SUBSEQUENT — DISTINCTION.—While a conditional estate may be created in a devise or purely voluntary conveyance by any words declarative of the purpose or intention of the donor, such words, declaring that the land is given for a certain purpose or with a particular intention, must, in an ordinary deed for a valuable consideration, be joined with others giving a right to re-enter, or declaring a forfeiture, in a specified contingency, or the grant will not be deemed conditional.

MUNICIPAL CORPORATIONS—WANT OF POWER—NOTICE.—A person who deals with a municipal corporation is chargeable with knowledge of its want of power to act in the matter.

DEEDS TO CITY—VALID ACCEPTANCE—WHAT IS.—If land is to be deeded to a city for the purpose of erecting a city hall thereon, and the taxpayers have approved the price to be paid therefor, and selected the site to be purchased, the action of the city council in appointing a committee to take possession of the land, “as soon as a deed thereof approved and accepted by the city solicitor shall have been duly recorded,” although informal, amounts to a valid acceptance of the deed, when so approved and recorded, and binds the city. Such action of the council is not a delegation of its power to purchase the land and accept the deed. The duty performed by the city solicitor, in such case, is purely ministerial or administrative.

DEEDS TO CITY—PAYMENT BEFORE APPROPRIATION—IRREGULARITY NOT AFFECTING TITLE.—If land is to be deeded to a city for the purpose of erecting a city hall thereon, and

the taxpayers have approved the price to be paid therefor, and selected the site to be purchased, and the city council has appointed a committee to take possession of the land, "as soon as a deed thereof approved and accepted by the city solicitor shall have been duly recorded," the action of the city treasurer, after such deed has been recorded, in paying over the price of the land before an appropriation therefor has been made by the city council is irregular, but the payment having been made and the land acquired, such irregularity does not affect the city's title.

INJUNCTION TO RESTRAIN EXPENDITURES OF PUBLIC MONEY BEYOND AMOUNT APPROPRIATED.—When the taxpayers of a city have, by their votes, expressly determined what sum shall be expended for a city hall and its site, the city council cannot expend more than that sum for the purposes specified. Hence, if the sum voted is to be raised by a sale of the city's bonds, and such sale produces more than the amount voted, the appropriation by the city council of the excess toward the purposes specified is illegal and may be enjoined.

Charles Acton Ives, for the complainant.

J. Stacey Brown, city solicitor, for the respondent.

2 TILLINGHAST, J. The complainant, who is a citizen and taxpayer of the city of Newport, and who sues for himself and also such other citizens and taxpayers of said city as may see fit to join in the suit, brings this bill to enjoin the city treasurer from making a certain alleged illegal expenditure of public funds, and also for other relief. The bill sets out, in brief, that on April 6, 1898, a majority of the tax-paying voters of said city, present and voting, voted in favor ³ of a proposition, which was duly submitted, for the purchase of a site for, and the erection of, a city hall, and for the expenditure of the sum of one hundred and thirty-five thousand dollars therefor, which sum was to be derived from the sale of bonds to be issued for that purpose; and that a plurality of the votes cast were in favor of the site known as the "Bull site," which was to cost thirty-seven thousand five hundred dollars. That subsequently, on the 14th of April, 1898, in pursuance of said action of the taxpayers, the city council of said city passed a resolution appointing a committee to take possession of the land in question "as soon as a deed thereof, approved and accepted by the city solicitor, shall have been duly recorded, and for the purpose of erecting a city hall thereon under the direction of the city council," etc. That thereupon, without further action by the city council, a warranty deed of the "Bull site" was accepted and approved by the city solicitor and duly recorded, and the sum of thirty-seven thousand five hundred dollars was paid for said land by the city treasurer out of the

funds of the city. That the habendum of said deed contains the following clause, viz.: "But no buildings for any other municipal purpose than that of a city hall shall ever be erected on the granted premises." That by the sale of the bonds authorized to be issued as aforesaid, the city realized the sum of one hundred and fifty-one thousand one hundred and thirty-six dollars and eighty-four cents, sixteen thousand one hundred and thirty-six dollars and eighty-four cents of which was received by way of premium on said bonds, which last-named sum the city council appropriated for the use of the special committee on the new city hall, if necessary. That the city charter of ⁴ said city contains the following provision, viz.: "The city council shall take care that moneys shall not be paid from the treasury unless granted or appropriated; they shall secure a just and proper accountability, by requiring bond with sufficient penalty and sureties, from all persons intrusted with the receipts, custody, and disbursement of moneys; and shall fix the bonds of all officers of said city, and in such amounts as they shall see fit. They shall have the care and superintendence of the city hall buildings, and the custody and management of all city property, with power to let or sell what may be legally let or sold, and to purchase and take in the name of the city such real and personal property, subject to the process of law, as they may think useful to the public interest. Nothing, however, contained in this charter shall be construed either as giving the city corporation any banking privileges, or the power to subscribe to any railroad, canal, or any public work whatever, or to do and transact any matter except such as belongs to the legitimate duties of a municipal body within its own province; or as giving power to vote money for any object except for the regular, ordinary, and usual expenses of the city. And any new project or proposition, involving any expenditure of money, exceeding the sum of three thousand dollars in any one year, shall first be voted on and approved by a majority of the electors, qualified to vote on any proposition to impose a tax or for the expenditure of money, voting in ward meetings, legally called for that purpose."

The bill prays for a decree commanding the respondent to immediately proceed to sue for and collect from Henry Bull, the grantor in the said deed, the amount paid for said land, and also that the defendant be perpetually enjoined from spending any money of the city in the erection or construction

of a city hall; and in particular that no money shall be spent until a good and unconditional deed of the land in question shall have been made and delivered to the city of Newport and duly accepted by the city council thereof, and also perpetually enjoining the respondent from expending upon said new project in any event any sum in excess of one hundred and thirty-five thousand dollars.

5 The respondent has demurred to the bill, and the questions raised by the demurrer, which have been argued by counsel, are: 1. Whether the deed in question conveyed an absolute estate in fee simple to the city; 2. Whether the action of the city council, in connection with the obtaining of the deed, was valid and binding; and 3. Whether the appropriation of the premium received from the sale of said bonds was lawful.

We think it is clear that the restrictive language, incorporated in the deed as aforesaid, did not have the effect to create a condition subsequent, and hence that the title of the city is not liable to be divested on the happening of the event specified. There are no words relating to re-entry or forfeiture, but simply a declaration that the land conveyed shall not be used for any other purpose than that specified; and we know of no authority by which such a grant can be held to be on a condition: *Field v. Providence*, 17 R. I. 803, 24 Atl. 143; *Greene v. O'Connor*, 18 R. I. 60, 25 Atl. 692; *Pawtuxet Baptist Soc. v. Johnson*, 20 R. I. 551, 40 Atl. 417; *Packard v. Ames*, 16 Gray, 327; *Kilpatrick v. Mayor etc. of Baltimore*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805. The deed in the recent case of *Faith v. Bowles*, 86 Md. 13, 63 Am. St. Rep. 489, 37 Atl. 711, contains a statement that the land was conveyed "for a public schoolhouse, as the property of the schools of said county, and for no other purpose, in fee." The court held that this language did not have the effect to create a condition subsequent.

There is a marked distinction in the rule as to what language is sufficient to constitute a conditional estate when used in a devise or purely voluntary conveyance and that which is sufficient for such purpose when used in an ordinary deed for a valuable consideration. In the former case, such an estate may be created by any words which declare that the land is given for a certain purpose or with a particular intention; while in the latter case, as said by the court in *Rawson v. School Dist.* 7 Allen, 125, 83 Am. Dec. 670, "these words must be conjoined in a deed with others giving a right to re-enter or de-

declaring a forfeiture in a specified contingency, or the grant will not be deemed to be conditional." The clause in question ⁶ contains no apt or proper words to create a condition. It simply declares that the land shall not be used for any other municipal purpose than that of a city hall. This language, at the most, only has the effect to create a confidence or trust in connection with the land conveyed, or to raise an implied agreement on the part of the grantee to use the land only for the purpose specified: *Greene v. O'Connor*, 18 R. I. 56 (60), 25 Atl. 692. This much, then, is clear, namely, that the city of Newport has obtained a title to the land in question which cannot be defeated by the happening of the event mentioned in said clause.

Whether, as charged in the bill, the city council, without any authority therefor, has accepted a deed which contains a limitation upon the right to use the property for other municipal purposes than that of a city hall, we do not now need to decide, and ought not to, because one of the parties in interest—the grantor in the deed—is not a party to the suit. And, moreover, whether the city council had authority to accept the deed in its present form or not, the complainant states no case on this point for an injunction, because, if they had authority to accept it with said objectionable clause, then the bill must fail; and, on the other hand, if they did not have such authority, as argued by the complainant, then, as the grantor was dealing with a municipal corporation, and therefore chargeable with knowledge of their want of power (*Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588), it follows that the objectionable provision in the deed would be simply nugatory and void. Whether, therefore, the city council did or did not exceed their authority in the premises, the bill is demurrable in this particular.

We think the action of the city council, in connection with the procuring and acceptance of the deed, although informal, was nevertheless sufficient in the circumstances to amount to a valid acceptance thereof, and hence to bind the city. It is to be borne in mind that the taxpayers had approved of the price to be paid for the land, and had also selected the site to be purchased. And it is not strange, therefore, that the city council considered the purchase as already consummated with ⁷ the exception of obtaining a proper deed of the land, which duty they very naturally and properly devolved upon the city

solicitor. This act, however, was in nowise a delegation on the part of the city council of its power to purchase land and accept a deed thereof, as argued by counsel for complainant, but was simply an ordinary and prudent step in the transaction. The duty performed by the city solicitor was purely ministerial or administrative: 1 Dillon on Municipal Corporations, 4th ed., sec. 96; *Kramrath v. Albany*, 53 Hun, 206, 6 N. Y. Supp. 54; *Edwards v. Watertown*, 24 Hun, 426; *Hitchcock v. Galveston*, 96 U. S. 341 (348). It is not to be expected that the members of the city council are to individually examine and collectively approve a deed, but that such a duty, requiring, as it does, special technical knowledge in the art of conveying, will be performed by the law officer of the city.

As to the point made by counsel that no appropriation was made by the city council for the payment of the agreed price for the land, we reply that while this is so, yet we think it is now too late for the complainant to take advantage of this error. The money for said purchase, though never formally appropriated by the city council, as of course it should have been, has nevertheless already been paid by the city treasurer, and by reason thereof the land now belongs to the city. And we do not think the mere fact that the payment was irregularly made affects the title or gives the complainant any standing in a court of equity. The city council probably looked upon the action of the taxpayers in the premises as being tantamount to an appropriation of the amount of the purchase price aforesaid, and hence that it was only necessary for them to take possession of the land and see to it that the proper deed thereof was put upon record. This view was clearly erroneous, as appears from the provision of the charter hereinbefore recited, and there is nothing of record in the case which warranted the city treasurer in paying for said land. But, as already stated, it has been paid for, and, so far as appears, no one has been or can be harmed by reason of the irregularity. As to future expenditures in connection with the project in hand, the city council will doubtless see ^s to it that appropriations are regularly and properly made therefor.

As to the third and last point taken by complainant's counsel, viz., that the appropriation of the amount of the premium received from the sale of the bonds was illegal, we are of opinion that his position in this regard is correct. The taxpayers by their vote have expressly determined what sum shall be expended for a city hall, including the purchase of the site there-

for, and it is not competent for the city council or any committee thereof to exceed said sum. The mere fact that the amount appropriated was derived from the sale of the city hall bonds can, of course, make no difference. Said amount is simply money in the treasury belonging to the city, and doubtless available for ordinary purposes, but it cannot be used for any "new project" without the express authority of the taxpayers.

The argument of the city solicitor that the site for a city hall having been purchased, the project of building a city hall thereon is no longer a "new project" within the meaning of the charter, and hence that it is competent for the city council to appropriate said sum to be used in connection therewith, is so manifestly fallacious as to require no serious consideration. The project of erecting a city hall can hardly be treated as an old one before the building is begun. He also argues that this additional sum will not be used unless it is necessary. Probably not. But in view of the fact that it lies with the taxpayers to determine what amount is necessary, and also in view of the further fact that they have already determined that question, it is not competent for the city council to review their decision.

As the demurrer in this case is general, and as the bill clearly states a case for an injunction as to the expenditure of the amount of the premium received from the sale of the bonds aforesaid, the demurrer must be overruled.

Demurrer overruled.

MUNICIPAL CORPORATIONS.—NOTICE OF THE POWERS of a municipal corporation must be taken by persons who contract with it: *Notes to Winchester v. Redmond*, 57 Am. St. Rep. 826; *Honaker v. Board of Education*, 57 Am. St. Rep. 853.

MUNICIPAL CORPORATIONS—INJUNCTION—ILLEGAL DISPOSITION OF FUNDS.—A resident taxpayer may maintain a suit to restrain the municipal authorities of a city from illegally disposing of its moneys: *Tukey v. Omaha*, 54 Neb. 370, 69 Am. St. Rep. 711, 74 N. W. 613.

APPROPRIATIONS OF MONEY, WHAT ARE, is the subject of an extended note to *Carr v. State*, 22 Am. St. Rep. 638-649.

What Words Create Conditions Subsequent.*

Definitions—Words of Condition—Intention—Construction.—A condition subsequent, in contracts, is one which follows the performance of the contract, and operates to defeat and annul it upon the subsequent failure of either party to comply with the condition: *Nash-*

*REFERENCE TO MONOGRAPHIC NOTES.

Deed may be avoided for breach of condition subsequent, when, how, and at whose instance: 44 Am. Dec. 743-759.

ville etc. R. R. Co., 2 Cold. 574, 584. With reference to estates, a condition subsequent is one which operates upon an estate already created and vested, and renders it liable to be defeated: Chapin v. School District, 35 N. H. 445, 450. Conditions subsequent are such as, when they do happen, defeat the estate: Raley v. Umatilla County, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890. A deed upon condition subsequent conveys the fee when it is executed, but the fee passes subject to the contingency of being defeated as provided in the condition, the grantor having the power of re-entry, upon condition broken; and if there is a breach of the condition, the estate continues in the grantee until defeated by actual entry: Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 145. Whether a condition is precedent or subsequent depends upon the intention of the parties: Star Brewery Co. v. Primas, 163 Ill. 652, 45 N. E. 145; Sheppard v. Thomas, 26 Ark. 617, 628. The usual words of a condition subsequent are, "so that," "provided," "if it shall happen," or "upon condition," the last expression being the most appropriate: Chapin v. School District, 35 N. H. 445, 450; Raley v. Umatilla County, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890; Rawson v. School Dist. No. 5, 7 Allen, 125, 83 Am. Dec. 670. No precise technical words or form of expression is necessary, however, to create such a condition. If the condition is not manifest from the terms of the grant, the construction must always be founded on the intention of the parties: Chapin v. School District, 35 N. H. 445, 450; Underhill v. Saratoga R. R. Co., 20 Barb. 455; Horner v. Chicago etc. Ry. Co., 38 Wis. 165, 173; Kilpatrick v. Mayor, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805.

The words "upon condition," or "provided always," etc., are not absolutely necessary to create an estate upon condition; their equivalent is sufficient: Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785. Mere words should not be deemed sufficient to constitute a condition and to entail the consequence of the forfeiture of the estate, unless, from the proof, such appears to have been the distinct intention of the grantor, and the necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence the court wholly in determining what the clause was intended to accomplish, but in this, as in every other case, its judgment should be guided by what was the probable intention viewing the matter in the light of reason: Post v. Weil, 115 N. Y. 361, 12 Am. St. Rep. 809, 22 N. E. 145. Conditions subsequent are raised only by apt and sufficient words. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it: Laberee v. Carleton, 53 Me. 211; Craig v. Wells, 11 N. Y. 315, 320; First Methodist etc. Church v. Old Columbia etc. Ground Co., 103 Pa. St. 608. A deed will not be construed to create an estate on condition, unless language is used which, ex proprio vigore, imports a condition; or unless the intent of the grantor to

make a conditional estate is otherwise clearly and unequivocally indicated: *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent: *Underhill v. Saratoga etc. R. R. Co.*, 20 Barb. 455, 459. But while it is true that no precise form of words is necessary to create a condition subsequent, there must be some words which, *ex vi termini*, import that the vesting or continuance of the estate is to depend upon the supposed condition: *Craig v. Wells*, 11 N. Y. 315, 320; and the condition must be so clear as to leave no doubt of the grantor's intention: *Board of Commrs. v. Young*, 59 Fed. 96. Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates: *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168; *Den v. Central R. R. Co.*, 26 N. J. L. 13; *Laberee v. Carleton*, 53 Me. 211; *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805; *Peden v. Chicago etc. Ry. Co.*, 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424; *Horner v. Chicago etc. Ry. Co.*, 38 Wis. 165, 174; *Taylor v. Sutton*, 15 Ga. 103, 60 Am. Dec. 682; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479; *Page v. Palmer*, 48 N. H. 385; *Hoyt v. Kimball*, 49 N. H. 322; *Crane v. Hyde Park*, 135 Mass. 147; *Gadberry v. Sheppard*, 27 Miss. 203; *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873; notes to *Chicago etc. Ry. Co. v. Titterington*, 31 Am. St. Rep. 46; *Cross v. Carson*, 44 Am. Dec. 744.

Conditions subsequent are created only by express terms or clear implication: *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479; *Gadberry v. Sheppard*, 27 Miss. 203; *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670; note to *Cross v. Carson*, 44 Am. Dec. 744. A condition subsequent will not be raised in a deed by implication from a mere declaration therein that the grant is made for a special and particular purpose: *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805. See the subdivision, *infra*, treating of special and particular purposes. The question as to whether a condition is precedent or subsequent is not dependent upon the place of words in a deed, but is to be determined from the whole instrument: *Rogan v. Walker*, 1 Wis. 527. The word "condition" is not necessary to the creation of a condition, but any words that will convey the proper meaning are sufficient. If a conveyance is made upon specified terms, stated in a separate instrument made by the grantee to the grantor, and upon no other consideration, the terms stated must be regarded as ex-

pressive of conditions subsequent, a breach of which may forfeit the estate; *Wilson v. Wilson*, 86 Ind. 472.

Covenants—Trusts—Expression of Condition—Construction—Reverter—Re-entry.—A clause in an instrument will not be construed to be a condition subsequent unless the intention is clearly manifested, the inclination being to interpret it as a covenant rather than as a condition. In cases of doubt as to whether a clause in a deed is a covenant or a condition, courts of law will always incline against the latter construction: *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850; *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4; *Hoyt v. Kimball*, 49 N. H. 322; *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479. So with a clause in an ordinary contract: *North etc. Rolling Stock Co. v. O'Hara*, 73 Ill. App. 691; or a provision in a contract for the sale and exchange of lands: *Barr v. Little*, 54 Neb. 556, 74 N. W. 850. Whether a provision in a deed is a condition subsequent or a covenant depends upon the intent of the parties, and such provision will, if there is any reasonable doubt as to what was intended, be held to be the latter. Hence, a deed to a railroad company of a right of way, which contains, as a part of the consideration, the provision that "the water . . . be made to run" in a certain place, will be construed to be a covenant attached to the land: *Peden v. Chicago etc. Ry. Co.*, 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424. Technical words do not always necessarily raise a condition subsequent, but may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only: *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805. Such words may be overlooked where they do not inevitably evidence the intention of the parties. In order that a covenant shall be read from the words of the instrument, they need not be precise or technical, nor in any particular form. Hence, whether words amount to a condition, a limitation, or a covenant may be a matter of construction, depending on the contract. The construction of clauses which might be interpreted either as conditions subsequent or as mere covenants must be against the conditions involving the forfeiture of the estate. Thus, though a deed contains a clause as follows: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used as a tavern or public house of any kind," this condition will not be construed as a condition subsequent, the failure to observe which will forfeit the estate, but as a mere covenant for the protection of the grantor. The office of this clause is merely to restrain the generality of the preceding clauses by limiting the uses to which the premises might

be put: *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809, 22 N. E. 145. Although apt words for the creation of a condition subsequent are employed, yet, in the absence of an express provision for re-entry or forfeiture, the court, from the nature of the acts to be performed or prohibited by the language of the deed, from the relation and situation of the parties, and from the entire instrument, will determine the real intention of the parties: *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479.

If a grant of property to be used as a cemetery contains a condition that a good fence shall be erected and maintained around it, the grantor being then the owner of adjacent lands, the stipulation will be construed to be a covenant and not a condition subsequent, and the grantor is not entitled to re-enter for failure to erect the fence: *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479. So an absolute conveyance of a right of way from a land owner and his wife to a railway company, reciting that it is given for and in consideration of the enhanced value to be given and contemplated to arise to the grantor's land and other property by the location and construction of the railroad, and for the consideration of full and complete value accruing in locating and maintaining a station on the land granted, is in no sense executory, and passes the title to the land entirely out of the grantors, and to the railway company. In such a case, the promises or obligations of the railway company referred to in the deed are in the nature of covenants, not conditions, and the grantors cannot reclaim the land on account of the nonperformance of the covenants by the grantee: *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. 472. If a deed of land contains a clause prohibiting its use for certain purposes, but without words of "condition," or any provision for re-entry in case of a breach, such clause is not a condition, but a negative covenant: *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145. A clause in a deed providing that the grantees shall erect and maintain, at their own expense and that of their grantees, the division fence between them and the grantor, is not a condition subsequent, but an implied covenant on the part of the grantees to maintain the fence, where there is nothing in the deed which suggests that the parties thereto intended or understood that a failure to comply with this clause should work a forfeiture of the land: *Palmer v. Ryan*, 63 Vt. 227, 22 Atl. 574. So where a deed, conveying an unconditional fee simple, and which has been executed and delivered, contains the following words: "It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements are to be put on the said tract but that which is immediately connected with the Western and Atlantic Railroad," etc., such words are words of covenant and not of condition: *Thornton v. Trammell*, 39 Ga. 202.

An estate on condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation: *Ayer v. Emery*, 14 Allen, 67. The words "in trust, nevertheless, and upon condition always" to use the premises for public worship, in a deed of land to a religious society, do not necessarily create a condition, but may, where the title of the grantor and the purposes of the grant are taken into consideration, import merely a trust: *Sohier v. Trinity Church*, 109 Mass. 1, 19. See, also, *Raley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890, and *Stanley v. Colt*, 5 Wall. 119, showing when the word "provided" may be taken as expressing a limitation in trust. See, also, *Woods v. Woods*, 87 Ga. 562, 13 S. E. 692. Whether a provision in a deed or will, which, as a part of the consideration, requires the payment of money to third persons by the grantee or devisee therein, within a fixed time after the title and right of possession vest in him will be construed to be a charge upon the land, or whether it will be construed to be a condition subsequent, depends upon the intent of the parties to the conveyance, or of the testator in the case of a devise, and it will always be construed to make a charge upon the premises, unless a different intent is clearly apparent, or, in the case of a deed, the language is so clear as to leave no room for construction or doubt: *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873. A deed free from any subsequent condition should not be construed as a conveyance made upon condition: *Scantlin v. Garvin*, 46 Ind. 262, 277. An absolute conveyance in fee, as a gift to a county of land for public buildings, does not enable the grantor to recover the land in case of the removal of the county seat: *Harris v. Shaw*, 13 Ill. 456; *Adams v. County of Logan*, 11 Ill. 336; and see *Board of Supervisors v. Patterson*, 56 Ill. 111. A condition subsequent must be plainly expressed or clearly implied before there can be a reverter: *Ayer v. Emery*, 14 Allen, 67; *Cook v. Trimble*, 9 Watts, 15; *Sohier v. Trinity Church*, 109 Mass. 1; *Vail v. Long Island R. R. Co.*, 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607.

A deed with a condition subsequent vests an estate subject to be defeated by the nonperformance of the condition: *Rogan v. Walker*, 1 Wis. 527, 556; *Underhill v. Saratoga etc. R. R. Co.*, 20 Barb. 455; *Shattuck v. Hastings*, 99 Mass. 23; or, as is sometimes said, a conveyance subject to a condition vests a qualified fee, and until the happening of the event which is to determine the estate granted, the grantor is divested of all right, title, and interest in the property conveyed: *Denver etc. Ry. Co. v. School District*, 14 Colo. 327, 23 Pac. 978; but compare *First Universalist Soc. v. Boland*, 155 Mass. 171, 29 N. E. 524, holding that an estate which may end on the happening of a certain event is what is usually called a determinable or qualified fee; and that a grant of real estate to a religious society, to continue so long as the land shall be devoted to certain specified uses, and to end when it shall no longer

be so devoted, is not a grant upon a condition subsequent. It is not essential to a valid condition subsequent that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition: *Horner v. Chicago etc. Ry. Co.*, 38 Wis. 165, 173; but a recital in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition unless it contains a clause of re-entry or forfeiture. The same words, however, may create a condition if a right of re-entry is reserved in favor of the grantor, in case of failure to carry out the intention expressed: *Raley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890. An estate on condition subsequent does not revert, however, until entry by the grantor or his heirs for breach of the condition: *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346; *Ruch v. Rock Island*, 97 U. S. 693; and the rule is the same where the grant upon condition proceeds from the government: *Schulenberg v. Harriman*, 21 Wall. 44; but a grantor in possession is not required to make a formal entry for condition broken, in order to re-vest the estate in himself: *Note to Cross v. Carson*, 44 Am. Dec. 756, discussing the question. If a deed is made upon condition that the grantee shall "forever" keep up and maintain, "at his own expense, a fence on the line between the land conveyed and the grantor's land, the land will not be forfeited because of the fact that the fence is not kept up after the death of the grantee, as the condition is personal: *Emerson v. Simpson*, 43 N. H. 475, 80 Am. Dec. 184, 82 Am. Dec. 168.

Special or Particular Purposes.—A deed is not to be construed as a grant on condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. A grant for a specified purpose, not inuring specially to the benefit of the grantor and his assigns, and without other words, does not create a condition subsequent: *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670; *Faith v. Bowles*, 86 Md. 13, 63 Am. St. Rep. 489, 37 Atl. 711; *Horner v. Chicago etc. Ry. Co.*, 38 Wis. 165, 175; *Vail v. Long Island R. R. Co.*, 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607; *Farnham v. Thompson*, 34 Minn. 331, 57 Am. Rep. 59, 26 N. W. 9; *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805; *Adams v. County of Logan*, 11 Ill. 336; *Board of Commrs. v. Young*, 59 Fed. 96, 102, 105; *Gadberry v. Sheppard*, 27 Miss. 203; *First Methodist etc. Church v. Old Columbia etc. Co.*, 103 Pa. St. 608, 614; *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719; *Board of Supervisors v. Patterson*, 56 Ill.

111; *Packard v. Ames*, 16 Gray, 327; *Strong v. Doty*, 32 Wis. 381; *Wilkes-Barre v. Wyoming etc. Soc.*, 134 Pa. St. 616, 19 Atl. 809. Words in a deed declaring that a grant is made for a specific purpose, or to accomplish a particular object, may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee; but the absence of any right or remedy in favor of the grantor under such a grant, to enforce the appropriation of land to the specific purpose for which it was conveyed, will not of itself make that a condition which is not so framed as to warrant in law that interpretation: *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670. Conditions subsequent are not raised by implication from the mere declaration in a conveyance of property that it is to be used for a special or particular purpose only: *Faith v. Bowles*, 86 Md. 13, 63 Am. St. Rep. 489, 37 Atl. 711; *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805. "We know of no authority," says Bigelow, C. J., in *Packard v. Ames*, 16 Gray, 327, 329, "by which a grant declared to be for a special purpose, without other words, can be held to be on a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate, unless coupled with a clause for the payment of money or the doing of some act by the grantee, on which the grant is clearly made to depend. Without some such clause, a grant for a specific purpose can be held at most only to create a trust, but not an estate on condition." The following illustrations show that the recital of the consideration, and a statement of the purpose for which land is to be used, are wholly insufficient to create a conditional estate.

A grant of land which has been used for a burying-place to a town, "for a burying-place forever," in consideration of love and affection, "and divers other valuable considerations," is not a grant upon a condition subsequent. Such a grant is not purely voluntary; it is only partially so: *Rawson v. School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670. So a grant of land for a valuable consideration upon trust that the trustee "shall at all times permit all the white societies of Christians, and the members of such societies, to use the land as a common burying-ground and for no other purpose," is not upon a condition subsequent: *Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376. But if land is dedicated for a burying-ground, whether by a common-law dedication, under which the fee remains in the owner, or in pursuance of a statute under which the fee is vested in the county in trust for the purposes named only, the lawful and effectual abandonment of the land as a burying-ground will restore the former owner to his right of possession: *Board of Commrs. v. Young*, 59 Fed. 96; *Young v. Board of Commrs.*, 51 Fed. 585. Where land is granted for the creation and establishment of a cemetery, not absolutely, but conditionally, the conditions are not conditions subsequent, and the grantee's right

depends upon their performance: *Bennett v. Culver*, 97 N. Y. 250, 257. Compare *Minor v. Deland*, 18 Pick, 266. A conveyance made to private persons as trustees "for the sole use and benefit" of a society named, "for a burial ground, and for no other purpose whatever," is a trust which ends when the land ceases to be used as a burial ground and the society is dissolved, and the land goes to the grantor's heirs: *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. Rep. 401.

In a deed of land to a religious corporation the words "for the purpose of erecting a church thereon only," following the description of the property, do not create a condition subsequent: *Farnham v. Thompson*, 34 Minn. 331, 57 Am. Rep. 59, 26 N. W. 9. If land is conveyed, for a nominal consideration, to a religious society, its successors and assigns, "upon and subject to the condition" that the grantee is to continue to hold, occupy, and improve the land and chapel standing thereon, for the support of religious worship in conformity with the doctrine, discipline, and worship of a denomination named, and also "upon the further condition" that no building or superstructure of whatever kind is to be erected on a certain portion of the land conveyed, until after an adjoining owner has ceased to keep open a contiguous strip of land, "or until after such time as said chapel shall cease to be used as a chapel" for worship according to the usages above named, the deed does not create a condition subsequent, and the land may be sold after it has become unfit for the purposes for which the estate was granted: *Episcopal City Mission v. Appleton*, 117 Mass. 326. Compare *Strong v. Doty*, 32 Wis. 381; *Baldwin v. Atwood*, 23 Conn. 367, concerning deeds of trust for church purposes. Words of express condition as to the erection of buildings for church purposes are not inapt as introductory to a declaration of trust: *Mills v. Davison*, 54 N. J. Eq. 659, 55 Am. St. Rep. 594, 35 Atl. 1072. If a deed of land to a religious society contains a habendum to the trustees thereof, in trust, to keep erected on the land a "church or house dedicated to the worship of Almighty God," to be used in a manner designated, but "on the express condition" that if at any time the land shall be left vacant for the space of two successive years, it shall revert to the grantor, the deed does not create any trust, but is a grant in fee directly to the society upon a condition subsequent: *Erwin v. Hurd*, 13 Abb. N. C. 91. So a deed of land to an ecclesiastic, with a habendum that the grantee "shall consecrate, or cause to be consecrated, the said property for the purpose of erecting a church building, and shall, within a reasonable time, erect, or cause to be erected, such building," does not create merely a personal covenant on the part of the grantee, but a condition subsequent, the nonperformance of which, within a reasonable time, will defeat the estate granted. The language of the clause is not merely descriptive of the consideration upon which the deed is given, but

qualifies the conveyance to the extent or in the manner named: *Upington v. Corrigan*, 151 N. Y. 143, 45 N. E. 359. A condition, however, in a deed of land to a religious society, that it shall be held "so long as it may be needed for meeting purposes," and then "to fall back to the original tract," is not broken by the removal of the meeting-house to an adjacent lot, where the land so conveyed is still needed and intended to be used for any purpose connected with the meetings of the society, if only for the purpose of hitching horses and like uses while people are attending meetings: *Carter v. Branson*, 79 Ind. 14, 17.

A condition in a conveyance that the grantee "will erect upon said premises a cotton factory within two years" from the date of the deed is a condition annexed to the estate conveyed, and not a personal covenant with the grantor: *Langley v. Chapin*, 134 Mass. 82.

If a deed conveys certain land to the grantees, designated as "commissioners to locate a seat of justice" for a county named, these words do not import a condition subsequent, and do not defeat the estate granted upon the removal of the seat of justice from the town for whose use and benefit the grant was made: *Gadberry v. Sheppard*, 27 Miss. 203. So where land is conveyed to a county for "county purposes," upon which a courthouse and jail are erected, but there is nothing in the deed from which it can be inferred that it was the intention of the grantor, or of the county authorities, to devote the property to any special county use, and by the terms of the conveyance it may be devoted as well to one county purpose as another, the mere removal of the county seat is no evidence of an intention on the part of the county authorities to abandon the property, or to devote it to any other than county purposes, and does not divest the county's title: *Pointevent v. Board of Supervisors*, 58 Miss. 810, 812. If the owner of land in a town, in consideration of the seat of justice being permanently established there, and for no other consideration, conveys it to persons named, the commissioners of the county, "and their successors in office, for the use of said county," the conveyance is to the county, and not to such persons as trustees for the county. Hence, where the grantor has received a sufficient consideration for the conveyance from the presumed benefit derived from the location of the county seat in such town for a period of fifty-five years, the land does not revert to him or his heirs upon the removal of the county seat to another town, as the deed contains no condition subsequent: *Summer v. Darnell*, 128 Ind. 38, 27 N. E. 162. See, also, *Scantlin v. Garvin*, 46 Ind. 262, where the title of the county to real estate conveyed to it was absolute, and free from any condition subsequent that it should be used for the erection of public buildings of the county, and for no other purpose. One who grants land to a county for public buildings, by an absolute conveyance in fee,

cannot recover it in case the county seat is removed: *Harris v. Shaw*, 13 Ill. 456; *Adams v. County of Logan*, 11 Ill. 336; and if the vendor, in a contract for the sale of land to a county, agrees to sell to it certain described property for a "courthouse and other county buildings," and the same clause is in the deed to the county, the deed conveys an absolute fee, without any conditions or restrictions, and the power of alienation is not limited or confined in any way: *Board of Supervisors v. Patterson*, 56 Ill. 111. In this case it is said that: "If A buys a lot of ground of B, and it is declared in the deed that he purchases it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention. But if a grant be made by A to B, on condition that B erect on the land granted a certain structure, and he fails so to do, the land might revert to the grantor": *Board of Supervisors v. Patterson*, 56 Ill. 111, 120. If a lot is conveyed to the board of police of a county "for the use of the county," the mere removal of the courthouse to another site does not affect the title of the county: *Miller v. Board of Supervisors*, 67 Miss. 651, 7 South. 429. Compare *Poitevent v. Board of Supervisors*, 58 Miss. 810, above cited in this subdivision, as to evidence of intention to abandon. If there is a discrepancy between the recitals in the preamble and the granting clause of a deed of a lot to a county "for the use of the county," the latter, being clear and unambiguous, must prevail, and the recitals in the preamble, being merely expressive of the motive inducing the execution of the deed, do not create a condition that the lot shall be used as a county site: *Miller v. Board of Supervisors*, 67 Miss. 651, 7 South. 429. On the other hand, if land is conveyed to a county upon the express condition that it "erect thereon within five years a courthouse for the use of said county, and keep and maintain the same thereon for the space of ten years," the conveyance is upon a valid condition subsequent, and if the county seat is removed before the courthouse has been maintained, after its completion, for the period of ten years, there is a breach of the condition, and the grantor may rightfully claim a forfeiture: *Pepin County v. Prindle*, 61 Wis. 301, 21 N. W. 254.

A clause in a deed that if any building shall be erected on said tract whose first cost shall be less than four thousand dollars, and which shall be used for any other purpose than a dwelling-house, or if the tract shall be used for any other purpose than a meadow or park, then the whole of said tract shall be at once forfeited and revert to the grantor, his heirs and assigns forever, is a condition of the title, and not a mere restriction or limitation of the right conveyed, nor a mere personal covenant of the grantee that terminates with his death: *Hoyt v. Ketcham*, 54 Conn. 60, 62, 5 Atl. 606; but where premises are conveyed with a clause in the deed that they shall not be used for any other purpose than as an orna-

mental park, with no provision for a forfeiture or re-entry, such clause does not attach a condition to the grant, or make the existence of the estate granted dependent upon the observance thereof, but creates a covenant running with the land: *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655.

A deed of land to a county by which the grantors covenant to "warrant and defend the same against all claims whatsoever, to the use and benefit of the grantee, for the special use, and none other, of educational purposes, and upon which shall be erected a college or institution of learning free from all sectional or political influence," does not create a condition subsequent: *Raley v. Umatilla County*, 15 Or. 172, 3 Am. St. Rep. 142, 13 Pac. 890. But it has been held that if the owner of land conveys it without consideration, and as a gift to the board of trustees of a corporation "for the building and maintaining on said grounds an institution of learning, as provided by" a certain statute, the deed is made upon condition subsequent that the board shall maintain upon the land an institution of learning in accordance with the provisions of such statute: *Mott v. Danville's Seminary*, 129 Ill. 403, 21 N. E. 927.

An agreement in a conveyance of a right of way to a railroad company that the company shall build two double-track bridges across a cut on the grantor's land immediately after the roadbed is finished, does not, without words of condition, create a condition subsequent, the nonperformance of which will forfeit the grant: *Roanoke Inv. Co. v. Kansas City etc. Ry. Co.*, 108 Mo. 50, 17 S. W. 1000. If a deed to a railway company for a right of way purports to be made in consideration of the benefits and advantages arising from the location, construction, and operation of the railroad, and of the sum of one dollar, and recites that the agreement "is made for the location, construction and maintenance of said railroad, and for that use and purpose only," the license to operate "to cease with the nonuse of the same for such purpose," the deed is not upon a condition that the road shall be built over the entire charter route of the grantee. Hence, the failure to so build it does not work a forfeiture of that part of the right of way upon which a road has been built: *Morrill v. Wabash etc. Ry. Co.*, 96 Mo. 174, 9 S. W. 657. If a conveyance of land to a railroad company "is made for railroad purposes only, and, if not so used, then it is to revert" to the grantor, and the terms of the condition do not limit or define the extent of the use, or the character or frequency of the trains that are to be operated over the land, it cannot be maintained, as a proposition of law, that the running of gravel trains, ranging from daily use to use every few months, but at no stated times, is not a use of the land for "railroad purposes": *Behlow v. Southern Pac. R. R. Co.*, 130 Cal. 16, 62 Pac. 295. If the grant creates in the grantee

an estate in fee determinable upon the nonperformance of the condition therein specified, such condition is, of course, a condition subsequent, but a provision in the deed whereby the company agrees, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at one of which all trains must stop, is merely a personal covenant on the part of the grantee, and not a condition subsequent. Hence, it is not available to defeat the estate created by the grant: *Behlow v. Southern Pac. R. R. Co.*, 130 Cal. 16, 62 Pac. 295.

Where the consideration recited in a deed to a railway company is the sum of one dollar, "and the permanent location of a depot on the grounds conveyed," these words create a condition subsequent, and do not show a personal obligation on the part of the grantee. Hence, the grantor, upon the abandonment of the depot on the ground conveyed, would be entitled only to a forfeiture of the land. He is not entitled to a decree for specific performance or to a judgment for damages: *Close v. Burlington*, 64 Iowa, 149, 19 N. W. 886; *Indianapolis etc. Ry. Co. v. Hood*, 66 Ind. 580. See, also, *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; and compare the railroad cases cited near the end of this note. A railway company which takes a deed upon three express conditions, namely, that its depot shall remain permanently at a place named; that a certain bridge shall be built within ten rods of an existing one; and that a bridge shall be built over the railway, to accommodate a certain street crossing, takes it upon conditions subsequent, as they do not impose any obligation on the grantee: *Brown v. Chicago etc. Ry. Co.* (Iowa, May, 1900), 82 N. W. 1003. But a mere understanding that a railway company "are to locate" their depot on land granted to the company is not a condition subsequent: *Ramsey v. Edgfield etc. R. R. Co.*, 3 Tenn. 170. A conveyance to a railroad company made upon the express conditions that it "shall erect and maintain a depot or station-house on the land, suitable for the convenience of the public, that at least one train each way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot," is upon conditions subsequent. Such provisions are not enforceable as covenants: *Blanchard v. Detroit etc. R. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142. Compare *Ritchie v. Kansas etc. Ry. Co.*, 55 Kan. 36, 39 Pac. 718. So a conveyance of two parcels of land to a railway company, one parcel "only for depot and other railroad purposes," and the other "for a railway," the deed reciting that both parcels are granted "solely for said road purposes," is made upon conditions subsequent, for the words "only" and "solely" are words of restriction or exclusion, and, as used in the deed, their effect is clearly to prohibit the grantee from using the lands for any other than the specified purposes: *Horner v. Chicago etc. Ry. Co.*, 38

Wis. 165, 175. In *Berkley v. Union Pac. Ry. Co.*, 33 Fed. 794, where land was conveyed to a railroad company upon consideration that it would "locate, erect, and maintain" its depot upon the land, and it did erect a depot thereon and maintained it for eleven years, when it was removed, it was held that the erection and maintenance of the depot was a consideration, perhaps in the nature of a condition subsequent, and that, there having been a part performance or payment, the title did not revert upon the depot being changed. So where a conveyance of land made to a state "expressly for the use and purpose of depot grounds" for a designated railroad, recites that if the state fails "to erect buildings and occupy the ground for the use and purposes mentioned, it shall revert to the grantors," the condition is performed, and there is no forfeiture where buildings have been erected and the land used for the purpose specified for thirty-three years, when such use ceases and a new location is made: *Jeffersonville etc. R. R. Co. v. Barbour*, 89 Ind. 375.

If an owner conveys a strip of land to a city, and between the description of the land in the deed and the habendum are the words: "This conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose," it has been held that these words do not create a condition subsequent, as they merely declare the purpose for which the strip of land conveyed is to be used: *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692. "It matters not," said the court, "that the statement of the purpose for which the land was conveyed is in the form of a condition. . . . It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out, nor does it reserve to the grantors and their heirs the right, in that event, to re-enter on the land and resume possession of it as of their former estate. Moreover, the purpose declared is in its nature general and public, and not one inuring specially to the benefit of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified": *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692. If a warranty deed for value conveys a strip of land to a town, and its "assignees forever," with the following clause succeeding the description: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title, and interest of the parties of the first part therein," such deed conveys the fee of the land, the clause restricting its use operating, at most, as a condition subsequent: *Vail v. Long Island R. R. Co.*, 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607. If a city takes a deed of land upon condition that it will create a public way sixty-five feet wide ad-

joining the remaining land of the grantors, such provision is a condition, a breach of which will work a forfeiture: *May v. Boston*, 158 Mass. 21, 32 N. E. 902. If a town acquires land by a deed conditioned that the land shall revert unless within a certain time the town shall erect thereon a certain building proper for municipal purposes, including a "public hall," the land reverts on breach of the condition, as it would with any other owner of land on condition: *Clarke v. Brookfield*, 81 Mo. 503, 51 Am. Rep. 243; but a deed of land to a municipality which in the habendum adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent, and the property does not revert to the grantor because of the failure to use it as a street: *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805. If a village accepts a deed, made in consideration of one dollar, in which, immediately following the description, are these words: "Said tract of land hereby conveyed to be forever held and used as a public park," and which deed is otherwise an ordinary warranty deed, an absolute title in fee does not, upon the face of the instrument, pass to the village, where the purpose of the conveyance is not elsewhere stated: *Flaten v. Moorhead*, 51 Minn. 518, 53 N. W. 807.

A conveyance of real property, made for a full and valuable consideration, declaring that the property "is for a public school-house, as the property of the schools of said city and for no other purpose, in fee," does not create a condition subsequent, and hence the property does not, on the abandonment of its use for school purposes revert in the grantor or his heirs: *Faith v. Bowles*, 86 Md. 13, 63 Am. St. Rep. 489, 37 Atl. 711. An absolute deed of land to the trustees of an academy, in consideration of its having been selected as a permanent site by the grantees for the purpose of erecting an academy thereon, does not impose a condition that the property shall be perpetually used for school purposes, as the words "permanent site" are not used in the deed with a view of compelling the trustees to maintain forever a building and school upon the property conveyed, but are, rather, descriptive of the nature of the use for which the trustees have selected the land: *Fuquay v. Trustees* (Ky., Oct. 23, 1900), 58 S. W. 814. A conveyance of a lot in fee, "for the erection of a schoolhouse thereon, and for no other purposes," is not upon a condition subsequent, the words quoted being merely a limitation upon the manner in which the property shall be used: *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. 98. A lot donated by deed "for school purposes so long as it shall be used for such purpose," is not an estate upon condition subsequent, but even if it was, the use of the property for thirty years for school purposes would be a substantial compliance with the condition: *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. 442. So, in a conveyance by warranty deed,

"for the use of the common schools," without any expressed condition, there is no implied condition that the property will revert to the grantor when its use for school purposes ceases: *Newpoint Lodge v. Newpoint*, 138 Ind. 141, 37 N. E. 650. A condition in a grant "for the use of school purposes only" is not broken without a showing that the grantee has diverted the land to other than school purposes only: *Taylor v. Binford*, 37 Ohio St. 262. See, also, *Denver etc. Ry. Co. v. School District*, 14 Colo. 327, 23 Pac. 978.

Intoxicating Liquors.—The form or connection in which a condition is made to appear in a deed is not material, if from the instrument it appears that the intention of the grantor as expressed in it was to convey an estate defeasible on the happening of a condition which he might lawfully annex to the grant of the title: *Jeffery v. Graham*, 61 Tex. 481. And a grantor in conveying land by deed has a right to insert, for an honest and beneficial purpose, a condition that the grantor, his heirs or assigns, shall not manufacture, sell nor give away, as a beverage, any intoxicating liquor upon the premises, and providing that upon violation of such condition, the land shall revert to the grantor, who shall at once take possession: *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 13 Am. St. Rep. 420, 42 N. W. 532; *Cowell v. Springs Co.*, 100 U. S. 55, affirming the same case, 3 Colo. 82; *O'Brien v. Wetherell*, 14 Kan. 467; *Plumb v. Tubbs*, 41 N. Y. 442; but see *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104. Restraining covenants in a deed upon the right of the grantee to sell intoxicating liquors on the premises are valid, upon the theory that the grantor has a right, in disposing of his property, to prevent such a use by the grantee as may diminish the value of the remaining land or impair its eligibility for other uses: *Jenks v. Pawlowski*, 98 Mich. 110, 39 Am. St. Rep. 522, 56 N. W. 1105. But a condition in a deed prohibiting the sale or giving away of intoxicating liquor on the granted premises will not be enforced when inserted for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business: *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 13 Am. St. Rep. 420, 42 N. W. 532.

A deed which, after the habendum, provides that one of the considerations of the grant is that no spirituous liquor shall be sold on the premises, and that if liquor is sold the deed shall be null and void, and the land shall revert to the grantor, is a deed conveying an estate on a condition subsequent: *Jeffery v. Graham*, 61 Tex. 481. So a condition that "intoxicating liquors shall never be sold as a beverage to be drunk on the premises, and if the same is so done habitually with the knowledge and consent of the owner, this instrument shall be void," if inserted in a conveyance of real estate, is a valid condition subsequent, the breach of which works a forfeiture of the estate granted: *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554, 51 N. W.

905. A condition in a deed that the grant shall be void if the grantee, his heirs or assigns, shall sell or permit the sale of spirituous liquors on the premises, is valid, although such sales are not illegal: *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391, 22 N. W. 816. A restriction in a deed as to the sale of liquors on the premises conveyed is a covenant running with the land, until the condition is broken, and is binding against a tenant or assignee of the vendee: *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *O'Brien v. Wetherell*, 14 Kan. 616. If the owner of a sawmill orally gives to a person certain lots in the vicinity of the mill, upon condition that the latter shall not keep or sell intoxicating liquors on the premises, the conveyance should contain such condition, although there was no express agreement to insert it, and the donee will be enjoined from keeping or selling intoxicating liquor on the premises until he accepts a conveyance with such condition: *Bad River etc. Imp. Co. v. Kaiser*, 82 Wis. 166, 51 N. W. 1100.

Maintenance and Support.—A conveyance by parents to their son, reciting that the latter “is to pay the taxes on said land, and has to support” the grantors “during their natural lifetime,” is not upon condition subsequent: *Stoddard v. Wells*, 120 Mo. 25, 25 S. W. 201. A condition in a conveyance from father to son, for the consideration of one dollar, that the property shall not be sold or disposed of during the life of the grantor, does not imply an obligation to support the father: *Jennings v. O'Brien*, 47 Iowa, 392. So a conveyance from father to son, in consideration of love and affection, and the payment by the latter to the former of two hundred dollars a year as long as the grantor shall live, and the further consideration that the grantee shall not, during the grantor's life, sell or convey the premises, is not upon condition subsequent, where the words “upon condition,” or other words of equivalent meaning do not occur in the deed, and there is no clause providing for re-entry: *Gallagher v. Herbert*, 117 Ill. 160, 169, 7 N. E. 511. If A and wife convey to B, and his heirs and assigns forever, after the life estate of the grantors, “as well for and in consideration of the natural love and affection” for B, as for “the better maintenance and support” of the grantors, such “better maintenance and support” is part of the consideration of the conveyance, and not a condition subsequent: *Risley v. McNiece*, 71 Ind. 434.

But a fee simple estate on condition subsequent passes by a conveyance to one and his heirs, in consideration and “on the condition” that they maintain the grantor's idiot son during life, and upon breach of the condition by the heirs of the grantee, after his death, though they be infants, the heirs of the grantor may enter and destroy the estate, but until they do so, the grantee's heirs will hold the land: *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742. A deed of warranty is on condition, and the grantor

or his heirs may enter and take advantage of a breach, although no right of entry is expressly reserved in the deed, where, following the description, is a provision stating that the deed is on the "conditions" that the grantee shall maintain and support the grantor and the grantor's wife during the term of their natural lives: *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500. A deed made upon the express condition that the grantee shall keep, maintain, and support the grantors, with a clause that the premises shall revert in case of failure, is upon condition subsequent, with the consequences attaching to such a condition: *Spaulding v. Hallenbeck*, 39 Barb. 79; *Delong v. Delong*, 56 Wis. 514, 14 N. W. 591; *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. 46. Compare *Laxton v. Tilly*, 66 N. C. 327. A deed with a condition that the grantor agrees "to make her home with the grantee," who agrees "to provide for, and take care of, the grantor during her natural life, and to be at all expense that may necessarily accrue for the maintenance" of the grantor, is upon a condition subsequent: *Hershman v. Hershman*, 63 Ind. 451. A conveyance by parents to a son in consideration of his covenant to support them may be rescinded by a court of equity, upon a breach of such covenant: *Blake v. Blake*, 56 Wis. 392, 14 N. W. 173. "It is not difficult," said the court in this case, "to hold that a condition, the breach of which is good ground in equity for canceling the conveyance of which it is a part, is a condition subsequent, unless there is something in the instrument to show that such a condition was not intended": *Blake v. Blake*, 56 Wis. 392, 397, 14 N. W. 173.

Wills.—There are no technical words to distinguish between conditions precedent and conditions subsequent in wills. The distinction is matter of construction. The words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is precedent, and, unless it is performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is subsequent: *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462; *Finlay v. King*, 3 Pet. 346; *Woods v. Woods*, 87 Ga. 562, 13 S. E. 692; *Essick v. Caple*, 131 Ind. 207, 30 N. E. 900. Thus, if a testator devises to his wife for her life his "homestead and five acres around the house," with the understanding that his son will support and take care of her, and that, at her death, the "homestead and land shall return to" the son "as compensation therefor," but the wife of the testator dies in his lifetime, and he makes no change in his will, the whole will, taken together, including the wish therein expressed that the son shall support and provide for his two sisters as long as they

remain single, shows that the condition upon which the son is to take the estate is a condition subsequent, and not a condition precedent: *Burdis v. Burdis*, 96 Va. 81, 70 Am. St. Rep. 525, 30 S. E. 462. If a will creates a life estate in a widow, the words used by the testator, namely, "for a home for her and my children," do not make the estate conditional: *Talbott v. Hamill*, 151 Mo. 292, 52 S. W. 203; and a bequest to a niece in consideration of her care and assistance toward the testatrix and her husband, to be performed during their natural lives, is not a condition, but rather an expression of the reason and inducement for the legacy: *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513.

But a devise of land to specified legatees, "to have and to hold in common for a home and support as long as they remain together, and should one or more leave they can take such as given them individually in this will, but have no share or control of this that is given in common, without the consent and signature of those that remain on the place," imposes a condition subsequent that the whole land be used for the support of such legatees as choose to reside thereon: *Harrison v. Harrison*, 105 Ga. 517, 70 Am. St. Rep. 60, 31 S. E. 455. If a devise is made to A on condition that he shall marry B, and is uncontrolled by other words, the devise takes effect immediately, for the condition is subsequent, and the devisee performs the condition if he marries B at any other time during his life: *Finlay v. King*, 3 Pet. 346. A devisee who takes a vested remainder subject to the performance of a condition subsequent does not forfeit his interest by noncompliance with that condition, if it is not the result of his own fault: *Bryant v. Dungan*, 92 Ky. 626, 36 Am. St. Rep. 618, 18 S. W. 636.

Miscellaneous Illustrations of Conditions not Subsequent.—If a grant or will is "upon the express condition" that the grantee shall pay to third persons, strangers to the deed, certain sums, the provision will be construed, not as creating a condition subsequent, but as granting the land absolutely, subject to the sums specified as a charge or lien upon it: *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873. See, also, *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736. So a grant of land in consideration of money, and that the grantee "shall well and truly fulfill all the agreements on his part contained in" a certain deed, containing numerous and minute agreements to contribute to the support of the grantor and his wife, is not upon condition subsequent, where there is no clause of re-entry or forfeiture, or provision that the deed shall be void in a certain contingency: *Ayer v. Emery*, 14 Allen, 67. And a deed of a tract of land bounded on one side by a railroad, with a conveyance of the water power of a brook upon the land, and the right of making a dam across the brook adjoining the railroad, "provided" said dam shall be so built as to answer for a street to the railroad, is not upon condition subsequent, the manifest in-

tent being merely to limit the kind of a dam which the grantee may build: *Chapin v. Harris*, 8 Allen, 594. An agreement in a deed, and forming a part of its consideration, that the grantee shall assume and pay a prior mortgage on the land, given by the grantor, is not a condition upon the breach of which title will revert to the grantor: *Martin v. Splivalo*, 69 Cal. 611, 11 Pac. 484. A grant made upon the express condition that the grantee shall pay to the grantors a specified sum annually is not upon condition subsequent. Such provision merely creates a lien on the premises by reservation, which, in its essential nature, resembles a purchase price mortgage: *Doescher v. Spratt*, 61 Minn. 326, 63 N. W. 736. Restrictions in a conveyance as to the erection or placing of buildings, are not technical conditions, a breach of which will work a forfeiture of the estate where they are not intended or understood as such, but are intended merely to regulate the mode in which the grantee may use and enjoy the land: *Ayling v. Kramer*, 133 Mass. 12. A stipulation in a conveyance "that a dwelling-house shall be moved or erected on said land within three years," at a cost not less than a certain sum, is not a condition subsequent: *Stone v. Houghton*, 139 Mass. 175, 31 N. E. 719.

Miscellaneous Illustrations of Conditions Subsequent.—If a grantee in a conveyance of land covenants to erect a house thereon within a certain time, under penalty of forfeiting the estate conveyed, the deed is clearly upon condition subsequent: *O'Brien v. Wagner*, 94 Mo. 93, 4 Am. St. Rep. 362, 7 S. W. 19. So a conveyance providing that, if the grantee makes any erections upon the demised premises, which will obstruct a certain view, the land shall be forfeited to the grantor, creates an estate upon condition: *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785. Such a condition is valid, although in favor of a stranger, and his title is not perfect: *Gibert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785. A grantee under a conveyance with a restriction that none but a dwelling-house shall be erected on the premises and that the "building, when erected, is not to be occupied for the purpose of carrying on any offensive trade or calling whatever," cannot use a part of a dwelling so erected as a grocery store, for he holds only a qualified and limited title, and is carefully restricted as to the kind of building that he shall erect and the use that he shall make of it: *Dorr v. Harrahan*, 101 Mass. 531, 3 Am. Rep. 398. A clause in a deed "upon the condition that no windows shall be placed in the north wall" of a house is a valid condition subsequent, and not a covenant, though inserted to protect the grantor's estate from being overlooked from windows in that wall: *Gray v. Blanchard*, 8 Pick. 284. If the owner of two adjoining lots, on one of which is a store building and on the other a dwelling-house occupied by him, conveys the former upon the express condition that the grantee "shall never erect any building nearer the street line of said land

than the store building now thereon," such clause is a condition subsequent: *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692. A conveyance of land "upon the express understanding and condition" that an institution of learning, incorporated, "shall be permanently located upon said lands" within a year, is a grant upon condition subsequent: *Mead v. Ballard*, 7 Wall. 290. An express condition in a deed of several lots that any building to be used as a dwelling-house erected upon the premises within a specified time shall cost a certain amount, is a condition subsequent: *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855.

The words in a deed, "providing they [the grantees] fence the land and keep it in repair," create a condition subsequent: *Hooper v. Cummings*, 45 Me. 359. So a provision in a contract that, if default be made by government contractors in the performance of their work, the government shall have the right to complete it at the contractors' cost, is a condition subsequent: *Harvey v. United States*, 8 Ct. of Cl. 501. When it appears that the intention of the grantors was to vest an estate at once in the grantee, authorized to take possession of the land, cultivate it in a farmer-like manner, and deliver to the grantors, or the survivor, annually, one-third of the products raised thereon, the condition is a condition subsequent, the estate being liable to be defeated on a failure to deliver the products or to work the land in the manner specified: *Drew v. Baldwin*, 48 Wis. 529, 532, 4 N. W. 576. A stipulation in a deed that the grantee "shall allow all people to pass and repass, to fish, fowl, and hunt, and to go to their meadows, and to do any business they shall have to do on said beach, as they used to do before this conveyance," is a condition subsequent: *Parsons v. Miller*, 15 Wend. 561. So is the condition of forfeiture of donated land, upon failure to pay to the owner of the improvements double their value in three months from the date of the deed: *Worthen v. Ratcliffe*, 42 Ark. 330, 347. A condition that, after the grantor's death, the grantee shall pay another a certain sum of money, is a condition subsequent: *Weinreich v. Weinreich*, 18 Mo. App. 364. So is a provision in a grant by a city that the conveyance shall be void in case it shall at any time afterward appear that the grantee is not seised of an estate in fee simple absolute in certain other lands, a condition subsequent: *Towle v. Smith*, 2 Robt. 489. So a provision in a deed that, in case the grantee shall fail to perform any of the conditions thereof, it shall be null and void, and that all rights conveyed thereby shall revert to the grantors is a condition subsequent: *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157; and recitals in a deed showing its consideration to have been the payment by the grantee of a small mortgage and the support of the grantor during life and her decent burial when dead, constitute conditions subsequent, according to *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585. A condition that, upon failure to perform,

the estate shall "cease, determine, and be of no effect," especially where there is a clause of re-entry, is a condition subsequent: *Rogan v. Walker*, 1 Wis. 527, 560. So, in some cases, is a condition following the grant of a life estate in land, which prohibits its conveyance by the grantee: *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170. Agreements that one shall purchase property held by a lessee, that the latter shall occupy and use the premises for a particular business for a certain time, after which the former will convey to the latter, are conditions subsequent: *Sioux City Stockyards Co. v. Sioux City Packing Co.*, 110 Iowa, 396, 81 N. W. 712. A condition, of a general character, in restraint of marriage, annexed to a devise or conveyance of real estate, is void, except, possibly, when the doctrine applies to the widow of a testator, concerning which there does not seem to be a unanimity of opinion: *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281.

If a deed conveys a strip of land to a railroad company, "provided," and "upon the express condition," that a certain system of drainage is to be kept up by the company, the grant is upon a condition subsequent: *Hammond v. Port Royal etc. Ry. Co.*, 15 S. C. 10. A conveyance of land made upon the condition that the grantee will construct and perpetually maintain a ditch for the drainage of adjoining land of the grantor, and which is made a part of the consideration of the transfer, is upon condition subsequent: *Mills v. Seattle etc. Ry. Co.*, 10 Wash. 520, 39 Pac. 246. So a provision in a deed of land to a railway company, namely, "that if the land shall cease to be used for railroad purposes, the same shall revert to the first parties, their heirs and assigns," is clearly a condition subsequent: *Monat v. Seattle etc. Ry. Co.*, 16 Wash. 84, 47 Pac. 233. And a conveyance of land to a railroad corporation upon condition that it shall construct its road thereon within a limited time is upon condition subsequent: *Nicoll v. New York etc. R. R. Co.*, 12 N. Y. 121. If a right of way is granted to such a corporation upon the consideration that it construct and permanently maintain the road upon the line so granted, and that it will erect and maintain its depot upon adjoining lands, the conveyance is upon condition subsequent; and if such depot and track are afterward abandoned, it is a breach of the condition, which defeats the grant: *Cleveland etc. Ry. Co. v. Coburn*, 91 Ind. 557, 562. A condition in a grant of land to a railway company that it shall construct a certain length of road within a given time, and that upon its failure to do so, the land shall revert to the grantor, is a condition subsequent: *Schlesinger v. Kansas City etc. Ry. Co.*, 152 U. S. 444, 14 Sup. Ct. Rep. 647. If land is deeded to one in trust for a right of way of a railroad company, the grant declaring that its purpose is the "building, constructing, maintaining, and using thereon a railroad, and for no other purpose whatever," and the grantee conveys his title to the company, the use named is a

condition subsequent: *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850. And a clause in a deed, to a railway company, of land for building purposes, that the grant is made on the further consideration that the company shall, once in every seven days, fill the grantor's tank with water, and in case of failure that the land shall revert is a condition subsequent: *Gulf etc. Ry. Co. v. Dunman*, 74 Tex. 265, 11 S. W. 1094.

IRELAND v. GLOBE MILLING COMPANY.

[21 R. I. 9, 41 Atl. 258.]

CORPORATIONS.—THE PROPER OFFICE OF BY-LAWS is to regulate the transaction of the incidental business of a corporation. They should not affect rights of property or create obligations unknown to the law.

CORPORATIONS—BY-LAWS—RESTRICTING TRANSFER OF STOCK.—A majority of the shareholders of a corporation have no right, under the form of a by-law, to impose restrictions upon a minority in the free transfer of their stock which are not specially authorized by statute or charter, or which are not reasonably necessary to the business of the corporation.

CORPORATIONS.—BY-LAWS MAY BE PASSED by a corporation on subjects not specially mentioned in the statute governing it so far as they relate to the regulation of its affairs; but it cannot go beyond this and restrict the private right of a shareholder to dispose of his stock.

CORPORATIONS—RESTRICTING TRANSFER OF STOCK. **A BY-LAW** which seeks to impose a personal obligation, not specified in the statute governing a corporation and not otherwise authorized by law, is not authorized by a statute providing that it may make by-laws consistent with the laws of the state and of its charter. Hence, a by-law restricting a shareholder's right to transfer his stock without first offering it to the corporation for a period of thirty days is invalid.

CORPORATIONS—ASSENT TO UNAUTHORIZED BY-LAW—EFFECT OF, UPON TRANSFER OF STOCK.—Although a shareholder in a corporation assents to a by-law not authorized by statute, and subsequently transfers his stock, such transfer can only have the effect of a contract by, and enforceable against, the assignor. The assignee is not bound by it by virtue of the assignment alone.

Case for damages, heard on the demurrer to a special plea in bar.

William H. Sweetland, for the plaintiff.

Irving Champlin and Warren R. Perce, for the defendant.

9 STINESS, J. This case has been twice before the court on questions of pleading successively raised. The plaintiff sues the defendant for damages for a refusal to transfer stock upon its books to him, which had been sold to him by William R. Stearns, the owner of record, by a delivery of the certificate and a power of attorney to W. H. Sweetland to make the transfer. Recalling only the pleas which relate to the question now before us, the defendant's third plea, at the first hearing, sets up the fact that upon its organization, August 10, 1892, certain by-laws were adopted, providing that no stockholder should sell his stock until thirty days ¹⁰ after an offer to the corporation, and that shares could be transferred by indorsement on the certificates, but the transfer should not be valid, except between the parties, until the same should be recorded on the books of the company, and the plea alleged noncompliance with those by-laws.

The plaintiff in reply set up certain statutes of Maine, where this corporation was created and is located, relating to corporations, and, following the decision of the supreme court of Maine in *Kennebec v. Kendall*, 31 Me. 470, we held that the corporation had no power to pass such a by-law, because the statute relating to by-laws gave no authority to pass a by-law of that kind: *Ireland v. Globe Milling etc. Co.*, 19 R. I. 180, 61 Am. St. Rep. 756, 32 Atl. 921. The defendant then filed additional pleas, setting up the substance of the by-law as an agreement between the subscribers to the stock and the corporation. It appeared, however, that the certificate of organization was not filed with the secretary of state until August 31, 1892, and hence, by the terms of the statute, the organization did not become a corporation or become authorized to do business until that time. The corporation, therefore, could not have made such an agreement on August 10, 1892: *Ireland v. Globe Milling etc. Co.*, 20 R. I. 190, 38 Atl. 116.

The defendant, by further amendment to the third plea, now sets up the Revised Statutes of Maine, caption 46, sections 1, 2, 6, and 12, and caption 48, sections 1 and 16 to 19, inclusive, under which, especially caption 46, section 2, providing that corporations may make by-laws consistent with the laws of the state, it is argued that the by-laws in question are consistent with the laws of the state, and so the corporation had power to pass them, although they are not among the classes enumerated in caption 46, section 6. It is also set out that

the by-laws have been continuously in force. The plaintiff demurs to the plea as amended.

The question thus raised is the validity of the limitation of a stockholder's right to transfer his stock without first offering it to the corporation for a period of thirty days.

We fully agree with the claim of the defendant that this question should be decided according to the law of the state of Maine, and such was our effort in the previous opinion. ¹¹ It is a delicate, and not always a satisfactory, task to declare the law of another state. It is to be regretted that this precise question has not been passed upon by the supreme court of Maine, but it seems to us to be included in the ratio decidendi of *Kennebec v. Kendall*, 31 Me. 470. That case has been affirmed in *Jay Bridge v. Woodman*, 31 Me. 573, and in *Belfast v. Moore*, 60 Me. 561. We are not aware that it has in any way since been criticised or disapproved.

That was an action of assumpsit for a subscription to corporate stock. A by-law of the company provided that "if the shares of any such delinquent stockholder shall not sell for a sum sufficient to pay his assessments with interest and charges of sale, he shall be held liable to the corporation for any deficiency." The gist of the decision is that, although a personal obligation may be imposed upon a holder of stock by charter or statute and also by his express agreement, such obligation cannot be imposed by a by-law under the general act respecting corporations. In other words, a statutory provision that "corporations may make by-laws consistent with the laws of the state and their charters" (Me. Rev. Stats., cap. 46, sec. 2); or that "corporations may determine by their by-laws the manner of calling and conducting meetings; the number of members that constitute a quorum; the number of votes to be given by stockholders; the tenure of the several officers; the mode of voting by proxy and of selling shares for neglect to pay assessments; and may enforce such by-laws by penalties not exceeding twenty dollars" (Me. Rev. Stats., cap. 46, sec. 6)—does not authorize a by-law which seeks to impose a personal obligation not specified in the statute and not otherwise authorized by law. The proper office of by-laws is to regulate the transaction of the incidental business of a corporation. They should not affect rights of property or create obligations unknown to the law. A majority have no right, under the form of a by-law, to impose restrictions upon a minority in the free transfer of their stock which are not specially authorized by statute or

charter, or which are not reasonably necessary to the business of the corporation.

¹² This we understand to be the doctrine of the decision in Maine. It is not based upon the fact, as assumed in argument, that no by-laws can be passed except those specially mentioned in the statute, but upon the lack of power in a corporation to restrict private rights, except in cases pertaining to the orderly conduct of affairs, of which the classes specified in the statute are examples. This is clearly brought out in *Kennebec v. Kendall*, 31 Me. 470, where the court says: "The general act respecting corporations contained in the Revised Statutes, chapter 76, section 6 [similar to the present Revised Statutes, chapter 46, section 6] authorizes them to determine by their by-laws the mode of selling shares for nonpayment of assessments, but it imposes no personal obligation to pay. The charter cannot be considered as specially delegating the power to impose such an obligation not imposed by the charter or any statute provision."

It is argued that as Stearns, the assignor of the stock in this case, knew of the by-law, took part in its adoption and so assented to it, he was bound by it, and could give to his assignee no greater rights than he himself had in the stock. But where the by-law was without authority of statute, it was held in *Jay Bridge v. Woodman*, 31 Me. 573, that it could only have the effect of a contract by, and enforceable against, the assignor, and that the assignee was not bound by it, by virtue of the assignment alone.

The cases relied upon by the defendant are not opposed to the doctrine stated above. In *Dane v. Young*, 61 Me. 161 (168), the by-laws of a bank provided that shares of stock should be transferable by indorsement in writing by the holder in presence of the cashier and two other witnesses. These were upheld upon the ground that they were incidental to the business of the bank, "as checks upon fictitious transfers of stock." The owner was not deprived of any private right thereby, but is simply required to conform to a prescribed rule for evidence of the fact and regularity of a transfer. As it is necessary for corporations to know who are the stockholders, authority to pass a by-law to this end cannot be doubted.

¹³ In *Came v. Brigham*, 39 Me. 35, a by-law provided how the promissory notes of the corporation should be given. This so clearly relates to the conduct of business as to require no comment.

In *Belfast etc. R. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362, a by-law related to dividends on preferred and nonpreferred stock. This, also, was a detail in the conduct of the business.

These cases are cited to show that by-laws may be passed on the subjects which are not specially mentioned in the statute. We do not question this proposition, so far as they relate to the regulation of the affairs of the corporation. What we say is that, when they go beyond this and restrict the private right of a stockholder to dispose of his stock, we understand the law of the state of Maine to be that such by-laws are not authorized by the statutes of Maine.

In this view of the case it is not necessary to discuss the general question of the validity of a by-law like this. It is enough to find that it is not authorized by the law of the state of Maine. Such a rule of law is not inconsistent with the law of this state, so far as it has been declared.

In *Lockwood v. Mechanics' Bank*, 9 R. I. 308, 11 Am. Rep. 253, it was held that, under the national currency act of Congress of 1864, a national bank had the power to make by-laws providing that no stockholder should be allowed to sell or transfer his stock while indebted to the bank without the assent of the directors, and that the stock of any stockholder should be held pledged and liable for the payment of any debt due or owing from such stockholder. But that case was essentially different from the case before us.

In *Sweetland v. Quidnick Co.*, 11 R. I. 328, the pre-emption clause in favor of the corporation was contained in the charter.

In *American Bank v. Oriental Mills*, 17 R. I. 551, 23 Atl. 795, the validity of the pre-emption right, created by the by-laws, was not considered, for the reason that the fact that the transfer had been made upon the books of the bank was evidence that the offer had been made and declined, or else that it had been waived, and that, in any event, the complainant could not take the objection.

¹⁴ Our conclusion is that the demurrer to the plea must be sustained, and this disposes of the other questions raised by the subsequent proceedings.

CORPORATIONS—BY-LAWS—RESTRICTING TRANSFER OF STOCK.—A by-law cannot take away, or even abridge, the substantial rights of a stockholder of a corporation. By-laws regulating the transfer of stock are merely intended for the protection of the interests of the corporation, and no effect should be given to them further than to attain that object. Such regulations are not restrictive of the stockholder's right to transfer his stock at

pleasure, subject to the charter rights of the corporation: See the monographic note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 384, showing to what extent transfers of stock may be restricted. The power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the state: See the extended note to *People's etc. Bank v. Superior Court*, 43 Am. St. Rep. 153, discussing limitations on the power of private corporations to enact by-laws.

CORPORATIONS—BY-LAWS—LIMITATION UPON ENACTMENT OF.—If power is conferred upon a corporation, by the provisions of a particular charter, or by a general statute, to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being excluded by implication: *Ireland v. Globe Milling etc. Co.*, 19 R. I. 180, 61 Am. St. Rep. 756, 32 Atl. 921.

CORPORATIONS—UNAUTHORIZED BY-LAWS RESTRICTING SALE OF STOCK.—A corporation having statutory authority to enact by-laws, to determine the manner of calling and conducting meetings, the number of members that constitute a quorum, the number of votes to be given by the shareholders, the mode of voting by proxy and of selling shares for neglect to pay assessments, is not empowered to enact a by-law providing that no stockholder shall sell his stock to any person unless he shall first offer the same to the corporation at the lowest price for which he is willing to sell it: *Ireland v. Globe Milling etc. Co.*, 19 R. I. 180, 61 Am. St. Rep. 756, 32 Atl. 921; and see the note to *Victor G. Bloede Co. v. Bloede*, 57 Am. St. Rep. 385.

PENNINGTON v. HOWLAND.

[21 R. I. 65, 41 Atl. 891.]

CONTRACTS—PAINTING PORTRAITS—AGREEMENT THAT WORK SHALL BE "SATISFACTORY."—If the subject of a contract, such as one to paint a pastel portrait, involves personal taste or feeling, an agreement that it shall be "satisfactory" to the buyer necessarily makes him the sole judge whether it answers that condition.

CONTRACTS—AGREEMENT THAT WORK SHALL BE "SATISFACTORY"—DISTINCTION.—If the subject matter of a contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, salability, and other like considerations, rather than to personal satisfaction, as in a contract for the painting of a portrait, an agreement that it shall be "satisfactory" means that it shall be "reasonably satisfactory."

CONTRACTS—ACCEPTANCE OF WORK.—THE RETENTION of the subject matter of a contract, such as portrait paintings, is not conclusive upon the question of acceptance, which should be left to the jury.

Assumpsit, for the price of certain pictures, heard on the defendant's petition for a new trial.

Samuel R. Honey, for the plaintiff.

William P. Sheffield, Jr., for the defendant.

65 STINESS, J. The plaintiff was employed to paint a pastel portrait of the defendant's wife for the sum of five hundred dollars, under a contract by correspondence which only provided for the price. The plaintiff went to the defendant's house in Washington, D. C., and began his work. The defendant testified that he at once objected to the proposed portrait, in street dress and hat, but the plaintiff said it was an artistic idea which he wished to carry out, and that if it was not satisfactory he would paint the defendant one "until **66** satisfied." He also testified that the plaintiff undertook the commission with the understanding that he would paint a satisfactory portrait.

The plaintiff denies this, and says that upon the completion of his work Mrs. Howland said that she wanted another portrait, taken in different style of dress, to show a pearl necklace which had belonged to her mother. He then painted a second portrait and went away, leaving his implements, as he says, to be sent to him, or, as the defendant says, because the portrait was not finished and because he was to return to complete it.

The defendant says that he received a letter from the plaintiff stating that the pictures should be framed to keep the pastel from brushing off, and that he would give instructions to a man, whom he usually employed, to do it. The frames came, the pictures were put into them, and after some correspondence the defendant paid for the frames, and the pictures are still in his possession.

Upon this general statement of testimony the plaintiff's claim was that he painted one portrait at an agreed price, and then another upon request, for which he has charged the same price, and that both were not only without conditions, but were said to be satisfactory.

The defendant claims that the plaintiff agreed, upon starting his work, that if the picture was not satisfactory he would paint another; that after expressing his dissatisfaction the plaintiff immediately started another which he did not finish; that the pictures were framed simply to preserve them until the last one should be finished, and that they have since remained with him in that way.

These conflicting claims present obvious questions of fact for a jury. Numerous exceptions were taken at the trial which can be better considered generally than in detail. According to the defendant's statement that the work was to be satisfactory to him, he asked the court to instruct the jury that he had the right to reject the first portrait if he was not satisfied with it.

The judge instructed the jury that "satisfactory" means ⁶⁷ "reasonably satisfactory"; but in response to another request he also instructed the jury that "an artist, if he agreed to paint a picture to one's satisfaction, has no cause of action for the price unless the buyer is satisfied, however good the picture is," adding: "But unless the man returns the picture he is conclusively held to be satisfied." This last instruction, without the added sentence, states the law correctly, according to the current of authority, and in giving the preceding instruction, that a portrait must be "reasonably satisfactory," the judge doubtless had in mind another class of cases to which that limitation may apply.

When the subject of the contract is one which involves personal taste or feeling, an agreement that it shall be satisfactory to the buyer necessarily makes him the sole judge whether it answers that condition. He cannot be required to take it because other people might be satisfied with it; for that is not what he agreed to do. Personal tastes differ widely, and if one has agreed to submit his work to such a test he must abide by the result. A large number of witnesses might be brought to testify that the work was satisfactory to them, that they considered it perfect, and that they could see no reasonable ground for objecting to it. But that would not be the test of the contract, nor should a jury be allowed to say, in such a case, that a defendant must pay because, by the preponderance of evidence, he ought to have been satisfied with the work, or, in other words, that it was "reasonably satisfactory." Upon this principle numerous cases have been decided.

In *McCarren v. McNulty*, 7 Gray, 139, an action to recover the price of a bookcase, the court said: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish material for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford

him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal ⁶⁸ rights are to be ascertained and determined solely according to its provisions." *Gibson v. Cranage*, 39 Mich. 49, was to the same effect, where the subject of the action was a portrait.

In *Zaleski v. Clark*, 44 Conn. 218, the plaintiff was to make a bust of the defendant's deceased husband satisfactory to her. The court held that it was for her alone to determine whether it was so, and that it was not enough to show that her dissatisfaction was unreasonable.

Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463, was for a suit of clothes. Devens, J., said: "It is not for anyone else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction."

The doctrine was carried to very great length in *Singerly v. Thayer*, 108 Pa. St. 291, 56 Am. Rep. 207, 2 Atl. 230, where an elevator had been erected in a building and "warranted satisfactory in every respect." It was held that, if it had been substantially completed so that the owner of the building could understand how it would operate, it could be rejected if it was not satisfactory.

In *Duplex Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749, the opinion sets out the two classes of cases, with reference to which a distinction has been made. One class is that which involves personal taste and judgment, examples of which we have shown, and the other class is that where the subject matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, salability, and other like considerations, rather than to personal satisfaction. For example, if one agrees to sell land with a satisfactory title, and shows a title valid and complete, the parties must have intended such a title to be satisfactory, rather than to leave an absolute right in the purchaser to say, "I am not satisfied," when no reason could be shown why he should not be satisfied. So if one agrees to do work in a satisfactory manner it must mean a workmanlike manner—as well as it would be expected to be done—rather than a merely personal or whimsical rejection. It is this class of cases to which the term "reasonably satisfactory" applies. Hence in the boiler ⁶⁹ case, last cited, it was held that a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and would not be regarded.

In *Wood Reaping Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906, the court says: "In the one class the right of decision is completely reserved to the promisor, without being liable to disclose reasons or account for his course, and a right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee and from all other tribunals. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination upon grounds which are just and sensible, and from thence springs a necessary implication that his decision in point of correctness and the adequacy of the grounds of it is open to consideration and subject to the judgment of judicial triers": See, also, *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583; *Daggett v. Johnson*, 49 Vt. 345; *Hartford Sorghum Co. v. Brush*, 43 Vt. 528; 1 Beach's *Modern Law of Contracts*, sec. 104.

Even in cases of the latter class, where a rejection is made in good faith, the dissatisfaction of the purchaser is held in many decisions to be sufficient: See note to *Duplex Co. v. Garden*, 54 Am. Rep. 709 (711).

The instruction to the jury in the present case that "satisfactory" means "reasonably satisfactory" was erroneous as applied to the subject matter of the alleged contract.

Evidently the trial judge thought that the definition of the term was of little weight, because the defendant had not returned the pictures, or either of them, and hence he added the words: "But unless the man returns the pictures he is conclusively held to be satisfied." The same instruction appears so clearly in other parts of the charge that the jury must have understood that the retention of the pictures made the defendant liable for the price of both.

Taken generally, the instruction would be quite correct, upon the ground that one cannot retain the property of another and still refuse to pay for it. But the instruction as ⁷⁰ given ignores the defense set up in this case, which is that the first picture was not accepted and the second not completed.

The demand relied on by the plaintiff is contained in his letter of January 7, 1896, in which he asks the defendant to send him both pictures for exhibition. To this the defendant replied that he wanted one and objected to the other being shown as a likeness of his wife. He also testified that he had not objected to the removal of this one, but only to its exhi-

bition. Now whether, under the circumstances of this case, there was a refusal to return the pictures, or an excuse for the retention of the other because it was not completed, were questions of fact for the jury. The question whether the contract was as claimed by the defendant also raised a question of fact. If the jury had found that the contract was for a satisfactory portrait, that the second was satisfactory but not completed, and that the other was not returned because of the suggestion of its exhibition, they might have found for the defendant. The facts that the pictures were on the walls of the defendant's home, and that he had paid for the frames, are such as would naturally be considered in determining an acceptance, but they do not conclude such determination nor remove the questions from the jury. The instruction, therefore, that by the mere retention of the pictures, under the circumstances of the case, the defendant was conclusively held to be satisfied with and liable for both, was erroneous.

New trial granted.

CONTRACT TO DO WORK TO THE SATISFACTION OF ANOTHER—CONSTRUCTION OF.—A contract for a portrait to be "satisfactory" to the customer gives him the option of refusing it at his pleasure: *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351. Compare *Adams etc. Boiler Works v. Schnader*, 155 Pa. St. 394, 35 Am. St. Rep. 893, 26 Atl. 745.

CONTRACTS.—THE RETENTION OF BENEFITS under a contract does not necessarily preclude the defendant from setting up, when sued for the contract price, that the work was not done according to the stipulations of the parties: *Mack v. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. 493; and see *Edison etc. Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 40 Am. St. Rep. 910, 36 Pac. 260.

KING v. GRANGER.

[21 R. I. 93, 31 Atl. 1012.]

MUNICIPAL CORPORATIONS—INJURY FROM OVERTAXED SEWERS—LIABILITY.—If a city turns into a sewer a much larger amount of surface water and sewage than was contemplated at the time of its construction, it is answerable in damages to an abutter who is injured thereby. Hence, it is liable if, after a sewer is constructed and an abutter has rightfully connected his premises therewith, it changes the grade of streets and turns into the sewer a large amount of surface water and sewage, formerly flowing in another direction, thereby overtaxing the sewer and causing a retroflux of sewage through such connection and upon the premises of such owner, to the latter's injury.

RELEASE—INJURY FROM CONNECTION WITH SEWERS—CONSTRUCTION.—A release, required by statute, as a condition of an abutting property owner's making connection with a city sewer, must be construed in view of the facts and conditions existing at the time of its execution, as well as those reasonably to be anticipated. It does not bar him from all claims for damages which may subsequently arise by reason of such construction. Hence, if the city, after the construction of a sewer, changes the grade of streets and turns into the sewer a large amount of surface water and sewage formerly flowing in another direction, thus overtaxing the sewer to such owner's injury, the city is answerable in damages notwithstanding such a release.

RELEASE REQUIRED BY STATUTE—EQUIVALENT—SEWER CONNECTIONS.—An agreement, by the owner of abutting property, who has been permitted to make connection with a city sewer, "that no claim for damages which may be occasioned to such estate, or any property thereon, in any manner, by the construction, use, or existence of such drain or connection, shall be made against the city," while not technically a release, must be held equivalent to the release required by statute as a condition of making such connection.

MUNICIPAL CORPORATIONS—SEWERS—CHANGE OF PLAN.—When a city desires to drain a much larger territory by the use of a sewer than was originally contemplated, and larger than the sewer is capable of draining, it must increase its capacity, for it cannot materially change its plan as to the territory to be drained without also changing its plan as to the size of the sewer.

MUNICIPAL CORPORATIONS—SEWERS—DUTY AS TO—NEGLIGENCE—LIABILITY.—When a plan for a sewer has been adopted by a city, and the sewer constructed in accordance therewith, judicial discretion ends and ministerial duty begins. The city then becomes answerable in damages for injuries to others resulting from the negligent discharge of such duty, or the negligent omission to discharge it.

Trespass on the case against a city, heard on demurrer to the declaration.

Irving Champlin, for the plaintiff.

Francis Colwell, city solicitor, for the defendant.

94 **TILLINGHAST, J.** The case which the declaration states is briefly this: The city of Providence constructed a sewer in Manton avenue, a public highway, for the purpose of carrying off the surface water, sewage, and drainage from said avenue and the land adjacent thereto. The plaintiff, who was and is a land owner on said highway, was assessed his proportional part of the expense of constructing said sewer, which assessment was paid by him. Thereafterward, on the ninth day of October, 1891, he made application to the commissioner of public works of the city for leave to connect his estate with said sewer for the purpose of taking the drainage and sewage

from his estate, which application was duly granted. At the time the sewer was constructed it had sufficient capacity to receive and carry away, and did receive and carry away, without injury to the plaintiff, all the sewage and drainage from said Manton avenue and the land adjacent thereto, including the drainage from the plaintiff's estate. Subsequently to the time when plaintiff connected his premises with said sewer, to wit, in 1895, the city changed the grade of said Manton avenue and of several other streets connected therewith, whereby the surface water which had formerly flowed in another direction in said streets was turned into said avenue and into the said sewer, which, not having been designed or constructed by said city to receive and discharge the surface water of said additional streets and the territory adjacent thereto, and being of insufficient capacity for this purpose, became congested and overflowed upon the plaintiff's premises, causing him to be damaged. The plaintiff alleges that the conduct of the defendant, in thus turning said additional surface water into the sewer, ⁹⁵ was wrongful and negligent, and that he is entitled to recover the damages which he has sustained by reason thereof.

The defendant demurs to the declaration, setting up that said sewer is a part of the sewer system of the city; that it is not required to construct said sewer of such size and dimensions as would carry off all the surface water, sewage, and drainage which from time to time after such construction was or might be turned therein as a part of said system; that it had the right to turn the surface water from said streets into said sewer; that the defendant is not liable for any defect or want of efficiency in the plan of drainage and sewerage adopted by it, and also that the defendant is not liable because the plaintiff had no right to connect his premises with said sewer, under the statute, except upon executing to said city a release of all damages which might at any time happen to such estate in any way resulting from said connection.

In support of the demurrer the defendant's counsel argue: 1. That the only substantive fact upon which the alleged negligence is based is that said sewer was not of sufficient capacity to carry off the surface water turned into it by a change of the grade of certain streets, in addition to the amount of water which had theretofore been turned into it; and 2. That there is no substantive difference between the statements of fact in said declaration and those in *Baxter v. Tripp*, 12 R. I. 310. We think the last-named contention is untenable. The facts in

Baxter v. Tripp, 12 R. I. 310, were materially different from those in the case before us. In that case the declaration alleged that the city wrongfully and negligently constructed a sewer in Lippitt street, and wrongfully and negligently used and maintained the same, whereby the plaintiff's estate was flooded and damaged. It was neither alleged nor claimed in that case that after the sewer was built a large amount or any amount of surface water, in addition to that originally intended to be taken care of by the sewer, was turned into it by changing the grade of the streets in the vicinity, or otherwise. And the court held that, under the agreement signed by the plaintiff at the time he applied ⁹⁶ for permission to connect his premises with the sewer, said agreement being similar to the one here set up by the defendant in its plea in bar, which we will consider later, the action could not be maintained. So that the question now presented, namely, whether in case a much larger amount of surface water is turned into a sewer than was contemplated at the time of its construction, and an abutter is injured thereby, he can recover, was not raised or considered in that case. There, the incapacity of the sewer, when constructed, to serve the purpose then contemplated by the city, was the thing complained of, while here it is the overtaking of the sewer in the manner aforesaid after its construction. We think that in such circumstances the city may properly be held liable for the damages sustained thereby, and hence that the demurrer to the declaration must be overruled.

We now come to the defendant's special plea in bar, which sets up in substance that, prior to and at the time when the plaintiff connected his premises with said sewer, he executed and delivered to the city a certain instrument in writing agreeing "that no claim for damages which may be occasioned to such estate, or any property thereon, in any manner by the construction, use, or existence of such drain or connection, shall be made against the city." To this plea the plaintiff demurs, and we are therefore called upon to determine as to its sufficiency. The particular grounds of demurrer are: 1. That the said agreement was not under seal, and that it contains no release to said city; and 2. That the bringing of the plaintiff's action does not constitute a breach of his said agreement, inasmuch as the damages complained of were not occasioned "in any manner by the construction, use or existence of such drain or connection." Plaintiff also demurs generally to said plea,

alleging that he is not barred by said agreement from bringing his action.

We think the first ground of demurrer is untenable. For, while it is true that said agreement is not technically a release, yet, as said by Durfee, C. J., in *Baxter v. Tripp*, 12 R. I. 310, where a similar agreement was considered, "it must be held to be at least equivalent to the release required by ⁹⁷ statute": See Pub. Laws, cap. 313, sec. 5, passed March 28, 1873.

We think the second ground of demurrer is well taken. The agreement in question was evidently entered into in view of the facts and conditions existing at the time, together with such other facts and conditions as might and ought reasonably to have been anticipated from the ordinary growth and development of the contiguous territory. That is to say, the plaintiff knew, or was bound to presume, when he signed said release, that by reason of the construction of other streets in the immediate neighborhood some additional surface water might naturally be turned into said sewer. But he did not know, and had no reason to anticipate, that the city would subsequently so change the grade of said Manton avenue, and of several other streets connected therewith, as to turn a large amount of surface water and sewage, which had formerly flowed in another direction, into said sewer, and thereby cause the same to overflow upon his premises. On the contrary, he had the right to presume that the city would not unreasonably tax the capacity of said sewer, so as to cause him damage. If this were not so, it would be competent for the city, after laying a sewer and obtaining releases from those who should connect their premises therewith, so to overtax the capacity of the sewer as not only to render it useless to abutters, but also to cause it to become a source of constant annoyance and damage to them. We do not think that the statute, under which the release in this case was given, should be so construed as to permit of such a wrong. It is true the language thereof is quite comprehensive, but it does not necessarily include such a claim as that here counted upon by the plaintiff. And as an abutter is compelled to sign a release in order to enjoy the principal benefit to be derived ⁹⁸ from the construction of the sewer, we think it should be construed as favorably to him as its terms will reasonably allow. And it is unreasonable to suppose that the general assembly intended that the release required of an abutter, as a condition of his connecting his premises with the sewer, should absolutely and forever bar him from all claims whatsoever

which might subsequently arise by reason of such connection. Suppose, for instance, that the city should neglect the duty of keeping the sewer in proper repair, and the plaintiff should be damaged thereby, could it be reasonably claimed that said release would bar him from recovery? We think not. The city is not absolved from the discharge of its duty in the premises in this regard by reason of the release; nor can it so change the plan which it adopted when the sewer was built as to render the sewer a nuisance to him. Moreover, it would clearly be against public policy to allow the city to shield itself behind an agreement of this sort from the consequence of its own negligence: See the suggestion of Durfee, C. J., in *Baxter v. Tripp*, 12 R. I. 318.

If the city desires to drain a much larger territory by the use of said sewer than was originally contemplated, and than said sewer is capable of draining, it must increase its capacity. It cannot materially change its plan as to the territory to be drained without also changing its plan as to the size of the sewer.

For any error in judgment on the part of the city authorities in devising and adopting a plan for taking care of the surface water and sewage of a given district, or of the city as a whole, many, and perhaps a majority, of the courts, hold that no responsibility exists, as in so doing the city is exercising a legislative or quasi judicial power, and not discharging a merely ministerial duty. But having once adopted a given plan and constructed the sewers in accordance therewith, the judicial discretion ends and the ministerial duty begins. And, like an individual, it then ordinarily becomes liable for damages to others resulting from the negligent discharge or the negligent omission to discharge such duty: *Child v. Boston*, 4 Allen, 41, 81 Am. Dec. 680.

⁹⁹ Finally, we fail to see how the case at bar can be distinguished, on principle, from that of *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520. In that case this court held that it was an invasion of private property for the city so to grade its streets as to collect the water from a wide area and then empty it, charged with all its miscellaneous filth, upon the plaintiff's land. In the case at bar, the declaration shows that the city, by changing the grade of several streets, has unreasonably overtaxed the sewer with which the plaintiff's premises are rightfully connected, and has thereby caused a retroflux of sewage through said connection and upon his premises, to

his damage. And we fail to see how this act of the city is any less an invasion of private property than was the act of the city in the case just mentioned.

The defendant's demurrer to the declaration is overruled and the plaintiff's demurrer to the defendant's plea in bar is sustained.

Case remitted to the common pleas division for further proceedings.

SEWERS—INSUFFICIENT CAPACITY—LIABILITY.—When a city provides waterways, they must be sufficient to carry off the water which may reasonably be expected to accumulate: *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091. If a sewer, whatever its plan, is so constructed as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his injury, water or sewage which would not otherwise have flowed or found its way there, the city is answerable: See the monographic note to *Chalkley v. Richmond*, 29 Am. St. Rep. 739; and compare the extended note to *Goddard v. Harpswell*, 30 Am. St. Rep. 387, 391.

SEWERS—OVERTAXING CAPACITY—LIABILITY.—A city established a system of sewerage, and built a sewer to drain a hitherto undrained district, which proved insufficient to carry off the sewage turned into it, and overflowed upon the plaintiff's land. With knowledge of this the city continued to attach lateral sewers to the main sewers, increasing the injury to the plaintiff's property. Held, that the city was liable: *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321.

SEWERS—LIABILITY.—THE ADOPTION OF A GENERAL PLAN OF SEWERAGE involves the performance of a duty of a quasi judicial character, but the construction and regulation of sewers, and the keeping them in repair after the adoption of such general plan, are ministerial duties, and a municipality which constructs and owns such sewers is liable for the negligent performance of such duties: *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244. A city is not answerable for an injury to private property by the overflowing of a sewer, caused by its incapacity, resulting from a mere error of judgment not amounting to gross negligence: *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139.

ARMINGTON v. PALMER.

[21 R. I. 109, 42 Atl. 308.]

CORPORATIONS—WRONGFUL USE OF CORPORATE NAME.—Although a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another.

INJUNCTION—WRONGFUL USE OF CORPORATE NAME—PARTY PLAINTIFF.—A bill for an injunction against a corporation to restrain it from the wrongful and injurious assumption and use of the name of an individual, or of another corporation, may be maintained by the owner of the name, without the intervention of the state, as such a suit is not one to annul the corporation.

CORPORATIONS—INJUNCTION AGAINST USE OF NAME—NEW NAME.—To restrain the wrongful assumption of a name by a corporation is not to annul the corporation, by depriving it of a name. If restrained from using a name chosen, it may, under the statute, choose another name.

TRADE NAMES—OBJECT OF LAW—RIGHT TO PROTECTION.—The law of trade names is designed for the protection of parties entitled to such names, as well as to prevent deception, and to protect the public from imposition. Hence, if persons engage in business, to sell "Armington & Sims Engines," as the "Armington & Sims Company, Successors to Armington & Sims Engine Company," the resemblance is so close as to be misleading and confusing in business matters, and the original company, being still in existence and having assets, has a right to its name, free from simulative interference.

TRADE NAMES — SIMULATION — RESTRICTION.—Although one may make and sell an article unprotected by a trade name, he cannot simulate the name or product of another so as to trench upon the latter's rights or to mislead the public.

INJUNCTION—USE OF CORPORATE NAME—PROOF OF DAMAGES—DEFENSE.—When a bill is brought to enjoin a corporation from the wrongful assumption of a corporate name to the injury of an individual or of another company, it is not necessary to show actual damages, and the absence of fraudulent intent is no defense.

CORPORATIONS — PURCHASE — CORPORATE NAME.—A purchase of the plant, machinery, stock, and visible property of a manufacturing corporation does not carry the name of the corporation to the company which purchases the property.

CORPORATIONS—PURCHASE—VOTING USE OF NAME.—If persons purchase the property of a corporation, and form a new company, with a new name closely resembling the name of the old corporation, which is still in existence and has assets, a purely voluntary vote by stockholders of the old company, without consideration, and giving to the new company the right to the name chosen by it, is of no effect, as against a minority who do not consent. A majority cannot give away the rights of a minority.

Bills brought by P. Armington and G. C. Sims to restrain the use of a corporate name.

Amasa M. Eaton and Archibald C. Matteson, for the complainants.

Richard B. Comstock and Rathbone Gardner, for the respondents.

¹¹⁰ STINESS, J. These bills set out that the complainants were formerly partners, under the name of Armington & Sims, in the manufacture of high-speed engines, which were protected by patents. In 1882 they procured an act of incorporation from the general assembly of this state, as the Armington & Sims Company, and upon organization they conveyed to the corporation all the assets of the partnership, including the patents and goodwill.

In 1883 another act of incorporation was procured for the Armington & Sims Engine Company, to which the former corporation made a similar conveyance. The latter corporation went on in business until August, 1896, when, becoming seriously involved, an agreement of six parts was entered into between the Armington & Sims Engine Company, a committee of the creditors of said corporation, creditors of ¹¹¹ said corporation who were not holders of its stock, creditors of the corporation who were holders of stock, holders of a majority of the stock of the corporation, and Armington and Sims as individuals. The indebtedness of the corporation was extended for the term of three years; the sum of thirty-five thousand dollars was advanced by certain creditors for small bills and a working capital; the control of the business was given to the creditors' committee, to whom a majority of the stock was transferred, and they were to sell the property of the corporation to pay its indebtedness, upon request of a majority of the creditors other than stockholders of the company.

It was found to be impossible to carry on the business in that way, and upon request, as aforesaid, the property was sold at auction to the respondent Scott, who, with the respondents Palmer and Bushnell, organized under the general laws of this state, a new corporation, with the name Armington & Sims Company.

A meeting of the Armington & Sims Engine Company was called to ratify and confirm the use of the name Armington & Sims in the name of the new corporation, and at said meeting, by a viva voce vote, and against the written protest of the complainant Sims, a resolution, granting to the respondents the right to use the name Armington & Sims Company as

the name of their corporation, was declared to be passed, said Armington not being present.

The respondents, under this name, are engaged in business to sell "Armington & Sims engines" as "Armington & Sims Company, successors to Armington & Sims Engine Company."

The complainants, individually and as stockholders in the last-named company, claim that this is a wrongful and injurious use of their names, against which they pray for an injunction restraining the use of such corporate name, and for other relief. The respondents demur to the bills, upon the ground that a suit for such an injunction cannot be maintained by private parties against a corporation organized under the laws of this state, but that suit must be brought by or in behalf of the state, and also that no facts are set out which entitle the complainants to relief.

¹¹² Upon the first ground of demurrer the question is whether a private party can maintain a bill against a corporation for the wrongful assumption of its name. The respondents rely upon *Rice v. National Bank*, 126 Mass. 300, *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875, *American Order Scottish Clans v. Merrill*, 151 Mass. 558, 24 N. E. 918, and *Paulino v. Portuguese Ben. Assn.*, 18 R. I. 165, 26 Atl. 36.

The first of these cases was an information quo warranto to exclude the respondents from exercising the franchise of being a corporation. The court held that such a bill must be filed by the state and not by private parties. With this doctrine we need not disagree. The second case was a petition for leave to file an information quo warranto, and to restrain the respondent from doing business under the name of the Boston Rubber Company, claiming that this was distinct from the franchise to be a corporation. The statutes of Massachusetts of 1870 provided that the name assumed in the agreement of association should not be changed but by act of the legislature, and also that the agreement was to be submitted to a commissioner of corporations for his approval. The court held that, as it was within his discretion to refuse to approve it, the court could not exercise that discretion and the certificate was conclusive. The court said that the statute was not intended to prevent the fraudulent use of trade names, but to prevent the identity of corporate names. The statute, like our own, required that the name should not be one in use by any existing corporation of the state. The statutes of Massachusetts (Pub. Stats., cap. 186,

sec. 17) provide for an application to the court in cases of private injury; but as the petitioner had acquiesced in the use of the name for ten years, without injury, the court held that it did not make out a case for injunction under the statute. The third case is to the same effect that the approval by the insurance commissioner of the name adopted by a beneficial association is conclusive, in a private suit, of the right of the association to such corporate name. Both of these latter cases so clearly rest upon the conclusiveness of the judgment of the commissioner that they are hardly in point in respect to our statute, ¹¹³ which has no such provision. Judge Holmes, in *American Order Scottish Clans v. Merrill*, 150 Mass. 558, 24 N. E. 918, foresaw a case like this one, in saying: "When there are no statute provisions as to the choice of names, and parties organize a corporation under general laws, it may be that they choose a name at their peril, and that, if they take one so like that of an existing corporation as to be misleading and thereby to injure its business, they may be enjoined, if there is no language in the statute to the contrary."

The possibility here suggested is fully sustained by many cases, among which are the following, some of which were cited by Judge Holmes: *Putnam v. Sweet*, 1 Chand. 286; *Newby v. Oregon Cent. Ry. Co.*, Deady, 609; *Holmes etc. Mfg. Co. v. Holmes etc. Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Farmers' Loan etc. Co. v. Farmers' Loan etc. Co. of Kansas*, 1 N. Y. Supp. 44; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576, and note; *Plant Seed Co. v. Michel Plant etc. Co.*, 23 Mo. App. 579; affirmed, 37 Mo. App. 313.

The principle upon which these cases rest is that, although a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another. The principle adopted is similar to that of a trade name or trademark, and is applied accordingly. Consequently, a court of equity has jurisdiction in such a case, without the intervention of the state.

The case of *Paulino v. Portuguese Assn.*, 18 R. I. 165, 26 Atl. 36, is quite different from the case now before us. In that case the complainants, a voluntary association, had appointed a committee to procure a charter, which was procured and under

which the corporators had organized. The bill sought to annul the charter because of alleged misconduct on the part of the corporators. The court held that this could not be done. Clearly, the remedy of the complainants was of a ¹¹⁴ different sort. After referring to some of the cases cited above, the court used the language, herein quoted from the opinion of Judge Holmes, in *American Order Scottish Clans v. Merrill*, 151 Mass. 558, 24 N. E. 918, thus intimating the very right which is claimed in this case.

But the respondents argue, as was argued in the Massachusetts cases, that to restrain the use of the name is practically to annul the corporation, because it cannot act without a name. We do not think that this result follows. According to the allegations of the bill, the name assumed by the respondents is so like that of the older corporation as to be misleading and injurious. We see no reason why the corporation, if it is restrained from using its present name, may not, under the General Laws of Rhode Island, caption 176, section 7, choose another name. That section, relating to an increase of the capital stock, says: "Such agreement may be amended in any other particular, excepting as provided in the following section," which relates to a decrease of the capital stock. The corporation, therefore, may still exist and enjoy its franchise, except in the wrongful use of its present name. This fact distinguishes the case from those in Massachusetts. Our opinion is, that the bill states a case, and that the demurrer must be overruled.

Upon the merits, subject to the demurrer, the case is submitted on bill and answer. There is no dispute that the respondents have the right to make and sell the Armington & Sims engine, the only contention being that of the right to use the name of the former maker, the Armington & Sims Engine Company, which had become known and established, and to which the stock of the original Armington & Sims Company had been surrendered and canceled, and thus the original corporation had ceased to exist. Stated generally, the defense is that, having the right to make the engine, the respondents have the right to use the name, which, for this reason, cannot injure the complainants; that no fraud was intended in the choice of the name; and that authority was given by the vote above referred to for the use of the name by the respondents.

¹¹⁵ The use of a trade name is in some respects different from that of a trademark. The latter usually relates chiefly to the thing sold; while, in addition to this, the former involves the source from which it comes, the individuality of the maker, both for protection in trade and for avoiding confusion in business affairs, as well as for securing to him the advantage of any good reputation which he may have gained. The law of trademark is designed chiefly for the protection of the public from imposition; that of trade name for the protection of the party entitled to it. A case, therefore, in regard to trade name is of somewhat broader scope than one relating to a trademark. It would be of little use to go over the numerous cases upon these subjects, as they all agree in principle, however variant may have been its application. For this case it is enough to say that, although one may make and sell an unprotected article, he cannot simulate the name or product of another so as to trench upon the latter's rights or to mislead the public. Lord Langdale stated the rule very plainly in *Perry v. Truefitt*, 6 Beav. 66, cited in 2 Story's Equity Jurisprudence, section 951, note, as follows: "The principle on which both the courts of law and equity proceed, in granting relief and protection in cases of this sort, is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person The case of *Millington v. Fox*, 3 Mylne & C. 338, seems to have gone this length, that the deception need not be intentional." Applying this principle to this case it is demonstrative. The name adopted by the respondents is so close a resemblance to that of the Armington & Sims Engine Company that there can be little doubt that it would be misleading and confusing in business matters, and the respondent advertises itself as the successor of said company. That company is still in existence. So far as appears, it still has assets, because ¹¹⁶ its accounts, bills, and notes receivable were excepted from the sale of its property. As such corporation it has the right to its name, free from simulative interference. Some of the cases cited by the respondents are of a different character. They relate to the right to use the name which has become descriptive of an article, e. g., "Singer," as applied to a sewing machine: Singer

Mfg. Co. v. Stanage, 6 Fed. 279; Singer Mfg. Co. v. Riley, 11 Fed. 706; Brill v. Singer Mfg. Co., 41 Ohio St. 127, 52 Am. Rep. 74; "Goodyear Rubber": Goodyear etc. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. Rep. 166. In this case the decision is based upon the descriptive character of the name, but the court suggests that, as the respondent was the older company, if there was any exclusive right it would be with that company rather than with the complainant.

Several of the cases cited support the complainants. Croft v. Day, 7 Beav. 84, enjoined the respondents from using their own names against the right of a prior firm of Day & Martin. McLean v. Fleming, 96 U. S. 245, held that the appellant infringed a trademark in using the name "Dr. McLane's Liver Pills," and that proof of fraudulent intent is not required where infringement clearly appears. Frazer v. Frazer Lubricator Co., 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. 639, where the appellant had sold his right to his preparation known as "Frazer Axle Grease," with the right to use his name. He afterward undertook to carry on business as S. Frazer & Co., but was enjoined.

But the respondents claim that the Armington & Sims Engine Company is not in business, and so no injury can follow. As we have said, the company is still in existence, and may be put on a footing for active business by a further contribution of capital, a thing which is often done. It has the right to its name, and if its right be violated it is not necessary to show actual damage, nor will the absence of fraudulent intent be a defense: Davis v. Kendall, 2 R. I. 566. This disposes of the defense on the ground of innocent intent.

The third branch of the defense, the claim of authority cannot prevail. The respondent did not acquire the right to use the name by purchase. They bought only the plant, machinery, stock, and such visible property. The purchase ¹¹⁷ of these does not carry the franchise or name of the corporation. Undoubtedly, as the respondents claim, the right to use the name goes with the right to manufacture, but this applies only to the use of the name in connection with the article, while the question here involved is the right to use the name of a maker, which stands upon a different ground.

The vote of the corporation is of no effect. In the first place, the majority of the stock was held by the creditors' committee, who do not appear to have held that amount of interest in the corporation. But if they had, or if the creditors whom they represented desired them so to vote, aside from

the defect of record by which it is claimed that the vote of a majority appears, it was done after the sale of the property and the organization of the new company, and without consideration. It was, therefore, a purely voluntary act. It was not referred to in the sexpartite agreement, which was the foundation of the whole matter. A majority cannot give away the rights of a minority.

We are, therefore, of opinion that the demurrer to the bill must be overruled, and that upon the showing of the bill and answer the complainants are entitled to relief.

INJUNCTION—TRADE NAME—SIMULATION.—Any similarity of name likely to deceive or mislead an ordinary unsuspecting customer, and divert and secure his trade from a person who has established a trade name, is a fraud which may be restrained by injunction: *Weinstock v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57, 42 Pac. 142. See, also, *Messer v. Fadettes*, 168 Mass. 140, 60 Am. St. Rep. 371, 46 N. E. 407. Property in a trade name will be protected. The use of the words, "Mechanical Store," is an infringement upon the trade name, "Mechanics' Store": *Note to Cady v. Schultz*, 61 Am. St. Rep. 767; and an injunction will issue against the unauthorized use of another's name in the conduct of a business, though he is not alleged to have been damaged by such use: *Bagby, etc. Co. v. Rivers*, 87 Md. 400, 67 Am. St. Rep. 357, 40 Atl. 171.

ROBINSON v. McKENNA.

[21 R. I. 117, 42 Atl. 510.]

FRAUDULENT CONVEYANCES.—A **FRAUDULENT INTENT** in the making of a conveyance is ordinarily a question of fact, but it is not always so.

FRAUDULENT CONVEYANCES—FRAUD IN LAW—FRAUD IN FACT.—There is no difference, in principle, between fraud in law and fraud in fact in the law of fraudulent conveyances. If the intent to defraud appears, no matter whether it is from the instrument itself or from extrinsic evidence, it will render the transaction void, fraud in law having the same effect, in this regard, as fraud in fact. The result, in either case, is the same, and it is this to which the law looks.

WAGES—FRAUDULENT ASSIGNMENT OF.—A debtor cannot place his earnings beyond the reach of attachment and at the same time receive a portion thereof for his own use.

WAGES—ASSIGNMENT OF—VALIDITY AS TO CREDITORS.—An assignment of wages to secure a present indebtedness, and also to secure the assignee for future advances of goods and merchandise, is valid and binding up to the amount of the debt secured, and of the goods actually furnished at the time of an

attachment by trustee process; but if it goes beyond this, and includes money paid over to the assignor out of his own earnings, the assignment is fraudulent as to creditors, and the assignor's employer may be charged as garnishee.

Assumpsit on book account. The wages of the defendant had been attached but they had been assigned, and the assignee intervened, claiming them. The garnishee was charged.

Claude J. Farnsworth, for the plaintiff.

W. Waldo Robinson, for the claimant.

118 TILLINGHAST, J. Michael Greenan appears as claimant of the money attached in this case, and opposes the charging of the garnishee on the ground that said money belongs to him by virtue of an assignment made by the defendant on the first day of July, 1892, and duly recorded. The case was tried before Rogers, J., in this division, jury trial being waived, who rendered a decision adverse to the claimant, and the case is now before us on the petition of said claimant for a new trial.

The facts as found, together with those which appear of record, are as follows: On July 1, 1892, the defendant owed Greenan seventy dollars and seventy-six cents for groceries, and he then gave him an assignment of his wages due and that might become due, for services to the garnishee, to January 1, 1893. An agreement was made between the assignee and the defendant, at the same time, that the former was to continue to furnish the latter with groceries, to give him eleven dollars a month to pay his rent with, and also from time to time during each month to let him have such other sums as he needed out of his earnings, and to apply the remainder of the wages collected on the old and the running account; and this agreement was carried out, the claimant crediting defendant each month with the balance which he retained out of defendant's wages **119** after advancing money for the rent, as aforesaid, and such other sums as he needed. After crediting defendant with the balance retained out of his wages, as aforesaid, if the assignee let defendant have any money before receiving the next month's pay, as he occasionally did, he would charge him on book account with the sums so advanced. These sums amounted to twelve dollars and twenty-five cents during the six months covered by the assignment. The total amount earned by defendant during said time was one hundred and fifty-two dollars and sixty-two cents. The total amount retained by Greenan and applied to defendant's account was eighty dollars and seventy-

five cents, and the amount received by the defendant out of his earnings was forty-three dollars and thirty-seven cents, besides the twelve dollars and twenty-five cents advanced by Greenan, as aforesaid, making the total amount received by defendant, during the time covered by the assignment, fifty-six dollars and sixty-two cents. Greenan furnished the defendant with groceries to the value of fifty-eight dollars and eighty-seven cents after the making of the assignment. Said assignment is in the usual form of an assignment of wages, and purports to convey to the assignee all of the defendant's earnings while in the employ of James Brown, the garnishee, between the first day of July, 1892, and the first day of January, 1893. It does not contain the agreement above set out, or any reference thereto.

It is agreed that the plaintiff was a creditor of the defendant at the time of the making of the assignment; but the claimant testifies that he was ignorant of that fact.

The question presented for our determination, in view of these facts, is whether the assignment was fraudulent as against prior creditors, and particularly as against the plaintiff. The claimant contends that it was not; that fraudulent intent is always a question of fact, and will not be presumed when the facts and circumstances surrounding the transaction are in any way reconcilable with honesty and fair dealing, nor even where they are as consistent with an honest purpose as with an intention to defraud. While we do not question the general accuracy of this proposition of law, yet it is by no means absolute or without exception. For while a fraudulent intent in the making of a conveyance is ordinarily a question of fact, yet it is not always so. Indeed, ¹²⁰ the author from whom said proposition was taken (Shinn on Attachment and Garnishment, sec. 114) adds immediately thereafter, in the same section, the following: "But when the defendant's conduct is not reconcilable with any other inference then that he intended to defraud his creditors by the transactions which are shown in evidence, fraud will be established": See, also, Shinn on Attachment and Garnishment, sec. 115 (d). As said by Stiness, J., in *Austin v. Sprague Mfg. Co.*, 14 R. I. 476: "The purpose of a deed may be so written into it that it can neither be read nor carried into effect without disclosing a fraud incapable of explanation or defense; its provisions may be so inconsistent with real honesty as to be referable only to a fraudulent intent." And again: "Fraud is the gist of an inquiry under

the statute, and it must appear either from the nature of the transaction or the intent of the parties." In other words, we understand the law to be that if the intent to defraud appears, no matter whether it be from the deed itself or from extrinsic evidence, it will render the transaction void—fraud in law having the same effect in this regard as fraud in fact. The result in either case is the same, and it is to this which the law looks. As said by this court in *Eichenberg v. Marcy*, 18 R. I. 169, 26 Atl. 46: "It can make no difference to a creditor whether his debtor puts his property out of his hands with an actual fraudulent intent to hinder and delay him, or does so by a conveyance which, although made in good faith, that is, without in fact intending to defraud, yet must inevitably and necessarily result in defrauding him. In short, the law looks upon fraud in the means, with equal disfavor as upon fraud in the endeavor": See, also, *Jones v. Spear*, 21 Vt. 431; *Gere v. Murray*, 6 Minn. 305; *Lee etc. Bank v. Talcott*, 19 N. Y. 146. In *Bump on Fraudulent Conveyances*, page 71, the law is stated as follows: "There is no difference in principle between fraud in fact and fraud in law. Where the direct and inevitable consequence of an act is to delay, hinder, or defraud creditors, the presumption at once conclusively arises that such illegal object furnished one of the motives for doing it, and it is thus upon this ground held to be fraudulent. The result is the ¹²¹ same when the illegal design is established as a question of fact. The inquiry is as to the intention of the debtor. When it appears that among the inducements operating upon him there is an intention to violate any of the duties owing by him to any of his creditors, the transfer is tainted and may be set aside at the suit of any creditor."

In the case before us the defendant, while ostensibly conveying all of his wages to the claimant, yet had a secret agreement with the latter that he should collect the same and turn over to him so much thereof, from time to time, as he might need in defraying a part of his necessary household expenses. By keeping in debt to his assignee as he did, the result of this arrangement was to keep his wages constantly covered from attachment by other creditors, while he remained in the enjoyment of a considerable portion thereof, thereby gaining an advantage to himself at the expense of his creditors, which the law does not allow. Had the secret agreement aforesaid been written into the assignment, it would doubtless have rendered it fraudulent as to existing creditors; and we think it is clear

that what could not be legally accomplished directly by the assignment ought not to be permitted to be accomplished by indirection. To hold such an assignment valid as against a prior creditor would be to hold that a debtor may place his earnings beyond the reach of attachment and at the same time receive a portion thereof for his own use.

The alarming extent to which creditors might be defrauded if such a transaction were held valid is readily conceivable. Take, for illustration, the case of a man whose wages amount to one hundred dollars per month, and who is indebted to various people. He makes an absolute assignment of his wages to his grocer, who, in consideration thereof, agrees to furnish him with groceries say to the amount of twenty dollars per month, and to turn over to him the balance of his earnings each month, to be used by him for the support of his family as he sees fit. Can it be seriously claimed for a moment that such a transaction is reconcilable with honesty and fair dealing, or even that it is as consistent with an honest purpose¹²² as with an intent to defraud? Clearly not. On the contrary, it is wholly inconsistent with an honest purpose, and needs but to be stated to be branded as fraudulent by all fair-minded men. That an assignment of wages to secure a present indebtedness, and also to secure the assignee for future advances of goods and merchandise, is valid and binding up to the amount of the debt secured, and of the goods actually furnished at the time of an attachment by trustee process, may be conceded: *Giles v. Ash*, 123 Mass. 353. But that it is good beyond this, as against creditors, so as to include money paid over to the assignor out of his own earnings, we feel constrained to deny: *Hickey v. Ryan*, 19 R. I. 399, 36 Atl. 1132.

The case of *Schofield v. McConnell*, 119 Mass. 368, is much relied on by counsel for the claimant in support of his contention. In that case the court held that the payment of money by the assignee to or for the defendant, only in cases when it was necessary for his support, would not be conclusive evidence of fraud, although this fact, which was relied on in the trial court to impeach the validity of the assignment, was entitled to consideration as bearing upon its alleged fraudulent character. There, the court below had found, as matter of fact, that the assignment was not made, nor were the subsequent arrangements between the parties made with any intent on the part of the claimant or the defendant to defraud the creditors of the latter but were made as the claimant properly required security, and

that payments of money by the claimant to or for the defendant were only in cases of necessity for his support. The facts of the case were different from those in the case at bar, in that there was no agreement at the time of the making of the assignment that any part of the defendant's wages should be returned to him. It appeared, however, that subsequent to the making of the assignment the assignee usually paid over to the defendant, or for his use, each month, various sums of money, which were either charged to the defendant or deducted from the amount received for his monthly wages, the balance only being applied to the payment of claimant's account for groceries. The court held that under the facts disclosed the ¹²³ assignment was not fraudulent as matter of law. While the case is somewhat different from the one before us on the facts, yet we fail to see that it is materially different in principle. The necessary result of the transactions between the assignor and assignee in that case was to hinder, delay, and defraud the defendant's creditors. And, this being so, we fail to see how the absence of an actual intention to defraud could properly control the decision. The case does not appear to have been very fully considered, no authorities are cited to sustain it, and we do not find that it has since been followed or referred to as an authority by the court in which it was rendered. At any rate, it does not commend itself to our judgment as being well founded in reason and principle, and therefore, while admitting it to be an authority for the claimant in the case at bar, yet we cannot assent to the doctrine which it declares.

Our conclusion is that the assignment in question is clearly fraudulent as against the plaintiff, and hence that the decision of the court in charging the garnishee was correct. The garnishee is charged in accordance with the decision.

FRAUDULENT CONVEYANCES—INTENT.—If the legal effect of a conveyance is to work a fraud on the rights of creditors, it will be deemed fraudulent as an inference of law, without regard to the motives which prompted it: *Kingman v. Mowry*, 182 Ill. 256, 74 Am. St. Rep. 169, 55 N. E. 330.

WAGES—ASSIGNMENT OF, VOID AS AGAINST CREDITORS. An assignment of wages to be earned under an existing contract is void if made for the purpose of preventing their being attached under trustee process: *Note to Metcalf v. Kincaid*, 43 Am. St. Rep. 396.

COONEY v. LINCOLN.

[21 R. I. 246, 42 Atl. 867.]

CONTRACTS MADE UNDER THE INFLUENCE OF OPIATES—AVOIDANCE OF.—In the absence of fraud, it is not enough, to avoid a contract, that the person making it was under the influence of opiates and not in possession of his full mental powers. A contract made under these circumstances is merely voidable and is binding, where it is fair, and was made with one ignorant of the other's condition as affected by opiates or lack of mental capacity, and where it has been executed, so that the parties cannot be restored to their former position.

RELEASE—PLEADING—CONCLUSION OF LAW.—An averment in a replication that the plaintiff was incapacitated from making a valid release is a conclusion of law rather than a statement of fact, when the question as to whether he was so incapacitated depends on the question whether or not his understanding had been so impaired by his sufferings and the influence of opiates as to render him incapable of understanding the nature and effect of the release.

RELEASE—PLEADING—DEFECTIVE REPLICATION.—In an action of trespass on the case for negligence, wherein the defendant pleads a general release from the plaintiff, the replication, to be a sufficient answer to the release, should aver either that the plaintiff's lack of mental capacity at the time of making the release was so great as to render him incapable of understanding the effect of the instrument, or, if his mental incapacity did not go to that extent, that the defendant had notice of his mental condition when he procured the release; otherwise, the replication is defective.

Gorman & Egan, for the plaintiff.

Dexter B. Potter, for the defendant.

246 MATTESON, C. J. This is an action of trespass on the case to recover damages for injuries alleged to have been received **247** in consequence of the negligence of the defendant's servant.

The defendant's second plea sets up a general release from the plaintiff to the defendant for the grievances in the declaration mentioned, and each and every of them, and all actions, causes of action, debts, dues, claims, and demands which the plaintiff had against the defendant.

To this plea the plaintiff replies, among other things, that the release was obtained from the plaintiff while she was suffering from the injuries received by her in her declaration mentioned, and while she was under the influence of opiates and not in the possession of her full mental powers, and while she was incapacitated from making and executing a legal and valid contract or release.

The defendant demurs to this replication on the ground

that it is not alleged that the defendant had knowledge that the plaintiff was under the influence of opiates and was not in the possession of her full mental powers and was incapacitated from making and executing a legal and valid release.

We think the replication is defective. The averment that the plaintiff was incapacitated from making and executing a valid contract is a conclusion of law rather than a statement of a fact, whether she was so incapacitated depending on the question whether or not her understanding had been so impaired by her sufferings and the influence of opiates as to render her incapable of understanding the nature and effect of the release. That her understanding has been impaired to this extent is not averred. In the absence of fraud, it is not enough to avoid a contract that the person making it should be under the influence of opiates and not in the possession of her full mental powers. A contract made in these circumstances is merely voidable; and if it be fair and has been executed so that the parties cannot be restored to their former position, and be made with one who is ignorant of the other's condition as affected by opiates or lack of mental capacity, it will be binding: *Molton v. Camroux*, 2 Ex. 487; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Bates* ²⁴⁸ *v. Ball*, 72 Ill. 108; *Johns v. Fritchey*, 39 Md. 258; *Matthiesen etc. Co. v. McMahon*, 38 N. J. L. 537; *Pollock on Contracts*, 1st Am. ed., 406. To constitute a sufficient answer to the release, therefore, the replication should aver either that the plaintiff's lack of mental capacity at the time of making the release was so great as to render her incapable of understanding the effect of the instrument, or, if her mental incapacity did not go to that extent, that the defendant had notice of her mental condition when he procured the release.

The demurrer to the third replication to the defendant's second plea is sustained and the replication overruled.

Case remitted to the common pleas division for further proceedings.

RELEASE EXECUTED UNDER THE INFLUENCE OF OPIATES—AVOIDANCE OF.—If one, in an action for negligence, seeks to avoid a release of all claims for damages signed by him, by setting up that he executed it in ignorance of its contents, at a time when he was suffering great pain from his injuries, and in a state approaching unconsciousness, caused by his injuries and by the use of opiates, the question of his capacity to execute a release is for the jury, under proper instructions from the court: See the monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 509, on ignorance of one's rights as a ground of relief.

AFFLICK v. BATES.

[21 R. I. 281, 42 Atl. 539.]

NEGLIGENCE—EXPLOSIVE CAPS KEPT BY CITY IN VACANT LOT—BREAKING OF CAUSAL CONNECTION—NON-LIABILITY.—If a city keeps explosive caps in a tool-chest on a vacant lot, for highway work, it is not negligent in leaving the chest open and unguarded, so that the caps may be removed by mischievous persons, but conceding that it is, and a number of the caps have been removed by someone, the act of a boy in exploding one of the caps picked up some ten or twelve feet distant from the chest, whereby another boy, the plaintiff, was injured, is the proximate cause of the injury, intervening between the negligence of the city and the injury to the plaintiff and breaking the causal connection between them, so that the city is not answerable for such injury.

Trespass on the case, against a city, for negligence, heard on the plaintiff's petition for a new trial.

Hugh J. Carroll, for the plaintiff.

James L. Jenks, for the defendant.

²⁸¹ MATTESON, C. J. The case shows that the explosive caps, by one of which it is alleged that plaintiff was injured, were kept by the city of Pawtucket in a large tool-chest which stood upon a vacant lot. The caps themselves were inclosed in a box contained in a tin box, the cover of which was secured by a string. The tin box was placed on a shelf near the bottom of the tool-chest. Shortly prior to the accident ²⁸² somebody, it does not appear who, had opened the tool-chest and removed the string from the tin box and taken out of the box within it some of the caps. The plaintiff and his brother, aged respectively nine and eleven years, with other boys were playing ball in a yard adjoining the vacant lot where the tool-chest stood. The ball with which they were playing was thrown or knocked over the fence into the vacant lot; and the plaintiff and his brother went after it and found two of the caps like those in the tool-chest lying on the ground ten or twelve feet distant from the chest. The plaintiff took one of the caps and his brother took the other. The latter gave his to another boy named Nolan, fourteen years of age, who was playing with them. The Nolan boy placed the cap on the curb-stone and dropped a stone upon it; whereupon it exploded with a loud noise. Particles of the exploding cap struck the plaintiff, who was standing a short distance away, and inflicted the injuries

for which he sues. The negligence complained of is the leaving of the tool-chest open and unguarded, so that access could be had to it by mischievous boys and the explosive caps kept in it could be removed.

Assuming that the cap by which the plaintiff was injured was one of those taken from the tool-chest belonging to the city, we do not think that the city was bound to guard against the mischievous and unlawful acts of others in removing the caps, and therefore we do not think that it was guilty of the negligence alleged: *Mahogany v. Ward*, 16 R. I. 484, 17 Atl. 860. But, assuming that it was, the act of the boy Nolan in exploding the cap was, in our opinion, the proximate cause of the injury; intervening between the negligence of the city and the injury to the plaintiff and breaking the causal connection between them: *Mahogany v. Ward*, 16 R. I. 481, 17 Atl. 860; *Carter v. Towne*, 103 Mass. 507.

New trial denied, and judgment entered, on the decision of Mr. Justice Rogers, for the defendant for costs.

NEGLIGENCE — INTERVENING AGENCY — LIABILITY.—If an original wrong only becomes injurious in consequence of the intervention of a distinct wrongful act or omission by another, the injury must be imputed to the last wrong as the proximate cause, and not to that which was more remote: *Pickett v. Wilmington etc. Co.*, 117 N. C. 616, 53 Am. St. Rep. 611, 23 S. E. 264. A responsible agent, intervening between the original negligence and the injury, cuts off the line of causation, and relieves the originally negligent party from liability: *McGahan v. Indianapolis etc. Gas Co.*, 140 Ind. 335, 49 Am. St. Rep. 199, 37 N. E. 601.

MUDGE v. HAMMILL.

[21 R. I. 283, 43 Atl. 544.]

DEEDS—ESTATES TAIL—RULE IN SHELLEY'S CASE.—To create an estate tail by deed under the rule in *Shelley's Case*, it is essential that the limitation to the heirs of the body should be to the heirs of the body of the ancestor who takes the particular estate, and to the heirs of the body of that ancestor alone. It is not enough that the limitation should be to the heirs of the person having the particular estate and of another who might have a common heir of their bodies. Hence, where the estate is limited to the wife for life, remainder to the heirs of the bodies of husband and wife, the freehold being in the wife alone, the limitation over is held to be a remainder, and the heirs take as purchasers *per formam doni*, and not by descent.

ESTATES—EXECUTORY AGREEMENTS—CONTINGENT REMAINDERS.—A deed is inoperative at law as a conveyance if the maker has no estate in the land, but only a naked possibility, such as a contingent remainder, but a conveyance of a naked possibility would be good in equity as an executory agreement, capable of being enforced according to its intent where the maker, by the happening of the contingency, is in a position to give the instrument effect; and a mortgage given by the grantee of such contingent interest, while invalid as a conveyance, is good as an assignment of his right under the deed, viewed as an executory agreement.

Samuel Norris, Jr., for the complainant.

James, William R., and Theodore F. Tillinghast, for the respondent.

283 **MATTESON, C. J.** The purpose of the bill is to obtain the cancellation of a mortgage alleged to be a cloud on the complainant's title to real estate. The case arises as follows: On December 3, 1851, Francis Le Baron D'Wolf, the complainant's father, was seised and possessed in fee of a certain tract of land situated on Papoosesquaw Neck in Bristol, and on that date conveyed it to William Bradford D'Wolf of Bristol by an indenture with habendum as follows:

284 "To have and to hold the said granted premises to him the said William B. D'Wolf, and to his heirs and assigns, but nevertheless that the said William B. D'Wolf, his heirs and assigns, shall hold the same upon the trusts and stand seised of the same to the uses hereafter declared and appointed by said Francis, that is to say:

"To the use of my present wife, Eliza W. D'Wolf, during her natural life, without impeachment of waste, and from and after her decease to the use of the heirs of the bodies of the said Francis and Eliza, between them two lawfully begotten, their heirs and assigns forever, free from said trusts.

"And for lack of issue living lawfully begotten of the said Francis and Eliza, upon the death of said Eliza, living the mother of said Francis, then to the use of his said mother, Sophie C. D'Wolf, her heirs and assigns forever, free from said trusts.

"And for lack of issue lawfully begotten of said Francis and Eliza, living at the death of said Eliza, and in case also of the death of the said Sophie, living the said Eliza, then to the use of the heirs at law of said Francis forever, free from said trusts."

Francis Le Baron D'Wolf died June 4, 1861, leaving his widow, Eliza W. D'Wolf, him surviving, and two children by

him begotten of the body of Eliza, viz., the complainant and her brother, Prescott Hall D'Wolf, sometimes called Francis Prescott D'Wolf. Sophie C. D'Wolf, the mother of Francis Le Baron D'Wolf, died December 10, 1879. On November 24, 1880, Eliza W. D'Wolf conveyed certain other property to the complainant, and thereupon the complainant, by deed of the same date, conveyed the estate to which this suit relates to her brother, Prescott Hall D'Wolf. In and by this deed the complainant, after reciting the indenture of December 3, 1851, and the conveyance from her mother referred to, in consideration of the premises and one dollar paid by her brother, Prescott Hall D'Wolf, quitclaims to him all the right, title, interest, property, claim, and demand which she then had, or of right ought to have or claim, at law or in equity, now or after the decease of their mother, Eliza W. D'Wolf, ²⁸⁵ in and to the estate conveyed in and by the aforesaid deed of trust, bounded and described, etc., with habendum to the said Prescott, his heirs and assigns forever, and a covenant of special warranty to him and them against the lawful claims and demands of all persons claiming by, through, or under her. Prescott Hall D'Wolf, by his deed dated March 1, 1883, mortgaged the estate to the respondent Mary Hammill, to secure the payment of a note for three thousand dollars. This mortgage contains the ordinary covenants of seisin, right to convey, and general warranty, and is executed and acknowledged in the usual form. Prescott Hall D'Wolf, the mortgagor, died December 30, 1884, without issue. Eliza W. D'Wolf died June 4, 1897, to which time she remained seised and possessed of the property under the indenture of December 3, 1851, and leaving the complainant as the only surviving heir of the bodies of the said Francis and Eliza.

The respondent Mary Hammill has held and still holds the mortgage referred to, no part of the debt secured by which, principal or interest, has been paid, and intends to foreclose the mortgage unless the debt is paid.

The question has been raised whether the effect of the indenture of December 3, 1851, was to create an estate tail special in Eliza W. D'Wolf, or merely an estate for life with remainders to the heirs of the bodies of Francis Le Baron D'Wolf and herself. We think its effect was to create merely a life estate in Eliza, with remainders to the heirs of the bodies of Francis and Eliza. To create an estate tail, under the rule in *Shelley's Case*, it is essential that the limitation to the heirs

of the body should be to the heirs of the body of the ancestor who takes the particular estate, and to the heirs of the body of that ancestor alone. It is not enough that the limitation should be to the heirs of the person having the particular estate and of another who might have a common heir of their bodies. Hence where the estate is limited to the wife for life, remainder to the heirs of the bodies of husband and wife, the freehold being in the wife alone, as in the case in the present instance, the limitation over is held to be a remainder, and the heirs take as purchasers per formam ²⁸⁶ doni, and not by descent: *Gossage v. Tayler*, Style, 325; *Frogmorton v. Wharrey*, 3 Wils. 125, 144; 2 W. Black. 728; *Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483; 3 Jarman on Wills, 5th Am. ed., *341; 2 Washburn on Real Property, *270. In the view, however, of the case which we have taken, we do not deem this question material.

Inasmuch as it could not be known who would answer the description of the heirs of the bodies of Francis and Eliza until the death of Eliza, or whether, indeed, there would be any persons at all answering that description, we think the remainders are to be regarded as contingent. Prescott Hall D'Wolf having died during the life of his mother, Eliza, and his interest by virtue of the remainder having been contingent on his surviving his mother, our opinion is that he took no interest in the land under the remainder created by the indenture: *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 Atl. 750.

The deed of the complainant to her brother, Prescott Hall D'Wolf, of November 24, 1880, purported to convey to him, his heirs and assigns, not only the right, title, interest, property, claim, and demand which she then had, or of right ought to have and claim, at law or in equity, but also all her right, title, interest, claim, and demand after the decease of their mother. Though this deed was inoperative at law as a conveyance, because made while its maker had no estate in the land but only a naked possibility, we think it was nevertheless good in equity as an executory agreement, and that it is capable of enforcement according to its intent, now that the maker, by the death of her mother, is in a position to give it effect: *Bailey v. Hoppin*, 12 R. I. 560, 568; *Wilcox v. Daniels*, 15 R. I. 261, 263, 266, 3 Atl. 204; *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 Atl. 750. We think, too, that the mortgage of Prescott Hall D'Wolf to the respondent, of March

1, 1883, though invalid as a conveyance for the reasons stated, was good as an assignment of his right under the deed to him from the complainant, viewed as an executory agreement.

The question has been argued at considerable length whether the covenant of special warranty contained in ²⁸⁷ the deed from the complainant to Prescott Hall D'Wolf amounted merely to a covenant in gross, enforceable against the complainant by Prescott Hall D'Wolf only, or a covenant running with the land, and so one of which the defendant could avail herself by way of estoppel against the complainant. But inasmuch as, in our opinion, the deed is enforceable as an executory agreement without regard to the covenant (*Wilcox v. Daniels*, 15 R. I. 264, 3 Atl. 204), we have not deemed it necessary to decide the question.

We do not think that the bill makes a case for relief.

DEEDS—RULE IN SHELLEY'S CASE—ESTATES TAIL.—"In any instrument, if a freehold be limited to the ancestor for life and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple": See the extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100, discussing the rule in Shelley's Case. Compare *Outland v. Bowen*, 115 Ind. 150, 7 Am. St. Rep. 420, 17 N. E. 281, showing what will be construed as an estate tail. See, also, the extended note to this case discussing estates tail.

DEEDS—EXPECTANT INTEREST—VALIDITY.—A conveyance or assignment of something which the assignor does not own, and may never own, is not operative at law, but may be given effect in equity: *Lennig's Estate*, 182 Pa. St. 485, 61 Am. St. Rep. 725, 38 Atl. 466; monographic note to *McCall v. Hampton*, 56 Am. St. Rep. 342, 344, on the assignment of expectancies. The conveyance of contingent remainders is discussed in the extended note to *Snelling v. Lamar*, 17 Am. St. Rep. 840.

ROBILLARD v. SOCIETE ST. JEAN BAPTISTE DE CENTREVILLE.

[21 R. I. 348, 43 Atl. 635.]

ASSOCIATIONS—BENEFIT SOCIETY.—THE WORD "SICKNESS," as used in the by-laws of beneficial societies, relating to sick benefits, includes mental alienation or insanity.

Assumpsit brought by a member of a beneficial society, to recover money claimed to be due as sick benefits.

Ambrose Choquet, for the plaintiff.

Albert R. Greene, for the defendant.

349 MATTESON, C. J. This is an action to recover from the defendant, a beneficial society, moneys claimed to be due, under the by-laws of the society, as sick benefits. The facts, as shown by the agreed statement, are as follows: In 1887 Denis Robillard joined the defendant society, and some time in 1890, while still a member, became, or was discovered to be, insane, and was paid by the defendant the benefits to which as an insane person he was entitled, under the by-laws of the society then in force, for a period of a year or more, and until September 1, 1892. Those by-laws were as follows:

“Article 28. Of Benefits.—Section 1. A member who shall find himself completely incapable of working on account of sickness, accident, or mental alienation shall receive five dollars per week so long as he shall furnish proper certificates.”

“Sec. 3. When a member shall have received two hundred dollars for the same sickness, with or without intermission allowing him to work, but never being completely cured, he then shall be entitled only to two dollars per week.”

In May, 1892, section 1 of these by-laws was amended by striking out the words “mental alienation,” and so as to read as follows:

“Section 1. A member in good standing, who finds himself completely incapable of working on account of sickness or accident, shall receive five dollars per week, so long as he shall furnish proper certificates.”

These amendments took effect September 1, 1892. Robillard, after it was known that he was insane, was removed from Boston, where he was then living, to Long Point, in the Dominion of Canada, and was supported in an institution at public expense until his decease, intestate, May 26, 1896. **350** At the time of his death he was still a member of the society in good standing, and the society paid his death benefits. From the time the amended by-laws took effect, September 1, 1892, the society ceased to pay him any benefits on account of his insanity or mental alienation, and he never was entitled to any benefits for physical malady or sickness as distinguished from mental alienation or insanity. This suit was brought in the lifetime of Robillard by his guardian, and since his death has been prosecuted by the administrator on his estate in this

state. The sum claimed is three hundred and twenty-two dollars, being for benefits at the rate of two dollars per week from the time when the amendment of the by-laws as stated above took effect, September 1, 1892, to October, 1895, when this suit was brought.

The question raised is, "Was Robillard entitled, on the facts stated, to benefits because of mental alienation or insanity, after the date on which the amendments to the by-laws went into effect, September 1, 1892." We think the question must receive an affirmative answer. The word "sickness," as used in the by-laws of beneficial societies, is construed to include insanity. In *McCullough v. Expressman's Assn.*, 133 Pa. St. 142, 150, 19 Atl. 355, a suit against a beneficial association, Mr. Justice Mitchell remarks: "That insanity is a sickness in some senses of the word is beyond question, and such legal authorities as appear to have considered the question hold that it is sickness within the meaning of such charters and articles of association as the defendant's." And in *Kelly v. Ancient Order*, etc., 9 Daly, 292, Mr. Justice Van Brunt says: "Insanity has always been considered a disease, and comes strictly within the meaning of the term 'sickness.'" And in *Pallazino v. St. Joseph's Soc.*, 16 Cin. Law Bull. 27, it seems to have been assumed, without question by either party, that insanity entitled a member of such a society to sick benefits. See, also, *Burton v. Eyden*, L. R. 8 Q. B. 295, in which it was held that insanity was sickness within the meaning of the rules of a friendly society by which any member should receive eight shillings per week during any sickness or accident that might befall ³⁵¹ him, unless by rioting or drunkenness. Blackburn, J., says: "I am of the opinion that lunacy is sickness within the meaning of the rules of this society It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability for earning his livelihood. If it were not the intention to include it, the rule should be framed so as expressly to exclude it." And Quain, J., in the same case, states: "I am of the opinion that insanity is sickness within the society's rules."

Perhaps the defendant intended by its amendment of the by-laws of May, 1892, striking out the words "mental alienation," that its members should no longer be entitled to sick benefits on the ground of insanity, since it ceased to pay sick benefits to Robillard from the time these amendments went into effect. But if such was its intention, it apparently be-

came aware of its failure to accomplish that end by the amendment, for in the revision of its constitution and by-laws in 1896, when it re-enacted the amended by-law, it impliedly recognized sickness as including mental alienation by adding to the by-law as it previously stood a clause limiting its liability, so that the by-law now reads as follows: "Article 30. Of Benefits.—Section 1. A member in good standing who finds himself completely incapable of working on account of sickness or accident shall receive five dollars per week, so long as he shall furnish proper certificates. However, the society shall not pay benefits for mental alienation when insane members shall be at the charge of the state or any institution where those persons are gratuitously supported."

Having answered the question in the affirmative, judgment must be rendered for the plaintiff, in accordance with the stipulation of the parties, for three hundred and twenty-two dollars and costs.

INSANITY IS SICKNESS: Note to Metropolitan Life Ins. Co. v. McTague, 60 Am. Rep. 666.

WILLIAMS v. HERRICK.

[21 R. I. 401, 43 Atl. 1036.]

MARRIAGE—PROOF OF, FROM COHABITATION AND REPUTE.—To prove a marriage by cohabitation and reputation, the origin of the cohabitation must have been consistent with a matrimonial intent; the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed; and the reputation of marriage must have been general and uniform.

Bill in equity, to avoid a trust, heard on a question of legitimacy. See Williams v. Herrick, 18 R. I. 120, 25 Atl. 1099, 19 R. I. 197, 32 Atl. 913, for previous opinions in the case.

Francis Colwell, Walter H. Barney, and Albert A. Baker, for the complainants.

Tillinghast & Tillinghast, Comstock & Gardner, Lewis A. Waterman, Edwards & Angell, Frank B. Towman, and Edward S. Hopkins, for the respondents.

⁴⁰¹ MATTESON, C. J. We do not think the evidence establishes the existence of a marriage between Moses Olney and Martha W. Olney prior to the ceremonial marriage between them on November 4, 1817, a short time before the death of Moses. It is not shown that any contract of marriage preceded the cohabitation, which appears to have begun on the death of Gideon Olney, the father of Moses, in 1798, and to have continued until the death of Moses in November, 1817. But we are asked to infer a marriage from such cohabitation, the birth of children during it, and the fact that these ⁴⁰² children and their mother were known by the name of Olney. There is, doubtless, as contended in support of the claim of marriage, a certain presumption of marriage, especially in cases involving legitimacy, arising from long-continued cohabitation. But in order to constitute evidence from which a marriage may be inferred the origin of the cohabitation must have been consistent with a matrimonial intent, and the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby to create the reputation of a marriage: *Beneficial Assn. v. Carpenter*, 17 R. I. 720, 24 Atl. 578; *Commonwealth v. Stump*, 53 Pa. St. 132, 91 Am. Dec. 198; *Appeal of Reading Fire Ins. Co.*, 113 Pa. St. 204, 57 Am. Rep. 448, 6 Atl. 60; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Wallace's Case*, 49 N. J. Eq. 530, 25 Atl. 260; *McKenna v. McKenna*, 73 Ill. App. 64; *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316. Inasmuch as the matters which are the subject of investigation had their beginning a century ago and ended in the early part of the present century, the ascertainment of the facts concerning them is attended with great embarrassment. There are no contemporaneous witnesses. The court is obliged to depend upon the uncertain light of family tradition. Considerable testimony of this kind has been introduced to the effect that prior to the ceremonial marriage it was not considered in the family that Moses and Martha were married, and we think that this view is confirmed by a consideration of the entire evidence. In support of the claim of a marriage prior to the ceremonial marriage it is contended that Moses desired to marry Martha, who was his cousin and living in his father's family as a household servant; that his father opposed the marriage because of the inferior social station of Martha, and threatened to disinherit Moses if he persisted in his purpose of marriage. But if this be the fact, and Moses and

Martha had a matrimonial intent it is difficult to understand why, on the death of the father, when, so far as appears, the cohabitation began, Moses and Martha should not have been regularly married and thus placed their relations beyond a doubt. We cannot help feeling that the association between Moses and Martha was not ⁴⁰³ of the character now claimed for it, and that the father's disapproval of it was for that reason. This view is strengthened by the taunts, which the testimony shows were uttered by other school children to the children of Moses and Martha, that their father and mother were not married; by the fact that Martha led a secluded life, and that there appears to have been but little association between her and the members of the Olney family until after the ceremonial marriage; and, finally, by the fact of the ceremonial marriage. For, even if it be conceded that this marriage was at the suggestion of Mr. Pabodie, and that it was entered into to enable Martha and her children to receive the property of Moses, which, in view of his power to give it to them by will, as he did, is not a very satisfactory explanation, it is an admission of the strongest character that their previous relations had not been those of marriage, but illicit. And the fact that a marriage was deemed necessary by a friend, who advised it, is evidence that there was no general and uniform reputation in the community that they were married. To prove a marriage by cohabitation and reputation, the reputation must be general and uniform: *Clayton v. Wardell*, 4 N. Y. 230, 236; *Brinkley v. Brinkley*, 50 N. Y. 184, 198, 10 Am. Rep. 460; *Barnum v. Barnum*, 42 Md. 251, 297; *White v. White*, 82 Cal. 427, 23 Pac. 276.

We also think that the great preponderance of evidence is in favor of the claim that Martha Olney was Martha Williams, the daughter of Martha Olney Williams and Zebedee Williams, and not Martha Rhodes, the daughter of Peleg Rhodes. We have reached this conclusion independently of the paper entitled "Monumental Genealogy," offered by the complainants, which, though we are inclined to consider it admissible as evidence, was objected to by the Rhodes claimants as incompetent.

MARRIAGE—PROOF OF.—COHABITATION AND REPUTATION do not constitute marriage, but only evidence tending to raise a presumption of marriage from circumstances. In any case, the cohabitation must not be meretricious, but matrimonial, to raise the presumption: *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172. Cohabitation, illicit in its inception, is presumed to so continue: *Cartwright v. McGown*, 121 Ill. 388, 2

Am. St. Rep. 105, 12 N. E. 737. Cohabitation, reputation, and the fact that the parties have represented themselves as husband and wife are generally sufficient evidence of a marriage: *Chiles v. Drake*, 2 Met. 146. 74 Am. Dec. 406; *Fornshill v. Murray*, 1 Bland, 479, 18 Am. Dec. 344; and evidence by a witness of reputation of marriage is admissible so long as it appears to be a general reputation: *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713.

IONNONE v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

[21 R. I. 452, 44 Atl. 592.]

RAILROADS — FELLOW-SERVANT — EMPLOYÉ RIDING HOME.—If a snow shoveler for a railroad company is invited, after his day's work in removing snow from the track is done, to ride upon a certain car of the company toward his home, and he accepts, he is not a passenger. Hence, if he is thrown from the car while so riding by the careless management of the train, and receives injuries resulting in his death, there can be no recovery therefor, as they must be deemed to have been caused by the negligence of a fellow-servant.

Trespass on the case for negligence.

John W. Hogan, for the plaintiff.

David S. Baker, for the defendant.

452 *MATTESON, C. J.* The plaintiff sues to recover damages for the loss of life of her husband, who was killed on the defendant's road, in Providence, November 28, 1898. The declaration alleges that the deceased, on the date named, had been in the employ of defendant, his work being the removal of snow from the tracks and roadbed of the company; that, having completed his work for the day, he was invited, with other shovelers, to ride upon a certain car belonging to the defendant, from the point where they had finished their labor **453** to another point a mile or two distant and adjacent to the place of abode of the deceased; that he accepted the invitation and boarded the car to be carried over this distance. The breach of duty alleged is that the train was carelessly managed and controlled, and, while moving forward, was suddenly, without notice or warning, stopped, and started backward with a jolt or jerk, whereby the deceased was thrown under the wheels of the flat-car on which he was riding, and received the injuries resulting in his death.

The defendant has demurred to the declaration, and contends, in support of the demurrer, that the case shows that the deceased received his injuries by the negligence of a fellow-servant. The plaintiff, on the other hand, contends that, under the facts set up in the declaration, the deceased was a passenger at the time of the accident, and not an employé, and hence that the fellow-servant doctrine has no application. She argues that the relation of carrier and passenger was established between her intestate and the defendant by the invitation extended to him, when his day's work was done, to ride on the train to a place near his home, and that, the intestate's work being done, he was not to be considered, at the time he received his injuries, as in the service of the defendant.

The declaration does not aver that the deceased paid anything for his transportation, nor that any deduction was to be made by the defendant from his wages on that account, or that he was paid a less sum by reason of his transportation than he would otherwise have been paid. The plaintiff does not claim that any such fact existed, but argues that it was a case of gratuitous carriage, and insists that the deceased was none the less a passenger because he was carried gratuitously. We do not think, however, that the facts set up in the declaration are sufficient to warrant the inference that the deceased was a passenger. The carrying of the deceased, after his day's work was done, to a point near his home is, we think, to be regarded not as creating the relation of a passenger, but rather as a privilege incidental to his contract of service, granted to him by the defendant, of ⁴⁵⁴ which he availed himself to facilitate his return to his home, and that it was a privilege accorded to him merely by reason of his contract of service: *Gillshannon v. Stony Brook R. R. Corp.*, 10 Cush. 228, 57 Am. Dec. 105; *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233, 87 Am. Dec. 635; *O'Brien v. Boston etc. R. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279. See, also, *McGrath v. New York etc. R. R. Co.*, 15 R. I. 95, 97, 22 Atl. 927.

The cases cited by the plaintiff are cases of passengers carried gratuitously, and not cases of employés so carried.

Demurrer sustained, and case remitted to the common pleas division for further proceedings.

WHEN SERVANT IS NOT A PASSENGER—NONLIABILITY OF CARRIER FOR INJURY.—An employé of a railroad company traveling from his home to his post of duty and back upon the cars of the company free of charge, as stipulated for in the contract of

service, is not a passenger, and the company is not liable for his death, caused, while so traveling, by the negligence of a coemployé: *Vick v. New York etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; and monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75, 97, showing who are passengers and when they become such. Compare *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721, 38 Atl. 524.

IN RE O'CONNOR.

[21 R. I. 465, 44 Atl. 591.]

STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.—If a statute adopted from another state has already received a judicial construction, it is to be presumed that it was adopted in view of such construction.

WILLS—CONSTRUCTION—INTENTIONAL OMISSION OF CHILD—HOW SHOWN.—When a testator omits to provide in his will for any of his children, or for the issue of a deceased child, and the statute provides that they shall take the same share of his estate that they would have been entitled to if he had died intestate, “unless it appears that the omission was intentional and not occasioned by accident or mistake,” an intentional omission need not appear in the will, but may be shown by extraneous evidence.

Bill in equity to construe a will.

Edward D. V. O'Connor, Edmund S. Hopkins, and Franklin P. Owen, for the parties in interest.

465 STINESS, J. The General Laws, caption 203, section 22, provides that when a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless it appears that the omission was intentional and not occasioned by accident or mistake.

The case stated raises the question whether such intention must appear in the will, or whether it may be shown by extraneous evidence.

The provision appears for the first time in our statutes in the section above mentioned, and it was evidently taken from the Public Statutes of Massachusetts, caption 127, section 21, where it has long been in force.

When a statute is adopted which has already received judicial construction it is to be presumed that it was adopted in view

of such construction: *Miller v. Coffin*, 19 R. I. 164, 36 Atl. 6; *Endlich on Interpretation of Statutes*, sec. 371, notes 80, 81. See, also, *Sayles v. Bates*, 15 R. I. 342, 5 Atl. 497.

⁴⁶⁶ In Massachusetts it has been held that an intentional omission under this statute may be shown by parol: *Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736; *Bancroft v. Ives*, 3 Gray, 367; *Converse v. Wales*, 4 Allen, 512; *Hurley v. O'Sullivan*, 137 Mass. 86. The reasons given for such a construction are: 1. That it could never have been the intention of the legislature to restrain the unlimited power of devising by will, especially when the whole object could be accomplished by the gift to a child of a shilling; 2. That the statute in its present form developed from a prior statute under which it had been held that the intention must be gathered from the will; and 3. That as the right of an omitted child does not arise under the will but by statute, parol evidence does not operate to contradict the will, but to prove a fact required to be established by statute.

In this state, under a statute providing that an after-born child not provided for in a will shall inherit in the same manner as if no will had been made, it was held in *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446, that the claim of the child could not be resisted by proof that the omission was intentional. The opinion distinguished the case from *Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736, upon the ground of the statutory proviso in Massachusetts, "unless it shall appear that such omission was intentional, and not occasioned by accident or mistake," and strongly intimated that under such a proviso parol evidence is admissible.

Now we find the same provision in our statutes. Upon the ground, therefore, of presumptive legislative intent, supported, as it is, by satisfactory reasons for such construction and the significant adoption of the provision for an intentional omission, our opinion is that the fact of such intention may be proved by parol evidence. The agreed facts show an intention on the part of the testator not to make a bequest to Agnes G. Hanlon, and the executor is therefore authorized to pay the legacies according to the terms of the will.

A STATUTE ADOPTED FROM ANOTHER STATE is ordinarily presumed to have been adopted with the interpretation theretofore given it by the courts of that state: *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111. See *Germania Life Ins. Co. v. Lewin*, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488.

WILLS—INTENTIONAL OMISSION OF CHILD—EVIDENCE—STATUTES.—In some of the states parol evidence is admissible to show that a child was intentionally omitted from a will, while in others such evidence is inadmissible, and the fact must be determined by the will itself: Note to *In re Atwood*, 60 Am. St. Rep. 883. That the question whether or not such omission was intentional is one of fact, and may be shown either by the terms of the will or by extrinsic parol evidence, see *Carpenter v. Snow*, 117 Mich. 489, 72 Am. St. Rep. 576, 76 N. W. 78. That it can be determined only from the face of the will, see *In re Salmon*, 107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030. The presumption under a statute like that in the principal case is, that the omission was not intentional, but this presumption may be rebutted by extrinsic evidence: *In re Atwood*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036.

ALLEN v. GERARD.

[21 R. I. 467, 44 Atl. 592.]

ATTACHMENT—GARNISHMENT—SURPLUS PROCEEDS OF SALE—CUSTODY OF THE LAW.—A BALANCE of the proceeds of a sale of attached, perishable, personal property, remaining in the custody of the clerk of the court, after an execution in favor of the plaintiff has been satisfied, is not subject to garnishment or attachment by trustee process, by one of the defendant's creditors, as such balance, being still in the registry of the court, is in the custody of the law.

Assumpsit. The case was heard on the plaintiff's exceptions to a ruling discharging a garnishee.

William A. Morgan, for the plaintiff.

Dexter B. Potter, for the defendant.

467 TILLINGHAST, J. The only question raised by the exceptions in this case is whether the ruling of the district court of the sixth judicial district, in discharging Frederick Rueckert, who is the clerk of said court, as garnishee in the above-entitled action was correct.

The facts, in so far as they are necessary for the determination of the case, are these: An action was brought in said court whereby certain personal property was attached. This property, being perishable, was subsequently sold by order of the court, under the provisions of the General Laws of Rhode Island, caption 254, sections 2, 3, and the net proceeds of the sale, amounting to one hundred and fifty-six dollars and four cents, were paid into the registry of said court. Said section 3 reads as follows: "If, after reasonable notice, no person ap-

pear, or no sufficient cause to the contrary be shown, said justice may direct the officer to sell the same in such manner, on such notice, and at such time, as said justice may ⁴⁶⁸ prescribe; and such officer shall immediately pay the proceeds of such sales, after deducting therefrom the necessary charges therefor, into the registry of such court, there to be held as security to satisfy such judgment or decree as the attaching creditor or complainant may recover." The plaintiffs in the action referred to recovered judgment and obtained execution thereon, for the sum of fifty-seven dollars and twenty-nine cents, which sum was paid to them by said Rueckert, clerk, out of the fund in the registry of the court, leaving a balance therein of ninety-eight dollars and seventy-five cents. Thereupon the plaintiff commenced the present action and served his writ upon said Rueckert for the purpose of attaching said balance in his hands.

The plaintiff's contention is that the clerk of the court having paid and satisfied the execution in the original action, the defendant therein became entitled to have and receive from him the balance remaining in his hands, and hence that it was subject to the process of garnishment at the suit of the present plaintiff. While there is some conflict of authority upon the question of the liability of public officials to the process of garnishment (see 2 Wade on Attachment, sec. 347), we think the decided weight thereof, as well as the better reason, is against such liability; and that a public officer who has money in his hands to satisfy a claim or demand which one has upon him merely as a public officer cannot, for this reason, be adjudged a garnishee. The reason is obvious. Public officials are charged with certain well-defined duties, and the law prescribes the manner in which they shall be performed. If, while in the discharge of these duties, the officer is interfered with by some person who is a stranger to the proceedings, confusion and inconvenience will necessarily be the result, new complications will arise, and a multitude of suits be made possible where there should have been but one. And in order to avoid such inconvenience and confusion, the principle has very generally been established that "no person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind": *Brooks v. Cook*, 8 Mass. 246; *Thayer v. Tyler*, 5 Allen, 94. See, also, cases collected in note to *Curtis v.* ⁴⁶⁹ *Ford*, 78 Tex. 262, 14 S. W. 614, 10 L. R. Ann. 529, and *Tefft*

v. Sternberg, 40 Fed. 2, 5 L. R. Ann. 221; Shewell v. Keen, 2 Whart. 332, 30 Am. Dec. 266.

But plaintiff's counsel argues that, although an officer of the court, having funds in his hand as such officer, is not liable to garnishment, such funds being then in custodia legis, yet, after the object for which such funds are held has been satisfied, such officer holds the balance thereof, not as an officer, but as trustee for the person entitled thereto, and hence, in a suit against such person, such trustee may be garnished. In support of this contention he cites, amongst other cases, *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405, which holds that surplus money held on execution in the hands of an officer, belonging to the defendant, may be garnished in his hands, and *Weaver v. Davis*, 47 Ill. 235, which holds that whenever an official holds money merely as the agent of the law, he cannot be charged on garnishee process in respect to such money; but that whenever his liability becomes changed from an official to one personal, he is amenable to the process. Conceding that these cases state the law correctly, we do not think they control the decision in the case at bar. Here the money sought to be reached is in the registry of the court, and hence undoubtedly in the custody of the law. It was placed there in pursuance of the statute. The clerk of the court, as such, has no control over it, nor is he any way liable for it, except as the custodian of the court. He holds the money in his official capacity only (*Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614, 10 L. R. Ann. 529, note), and can only pay it out as ordered by the court. After satisfying the execution in the original action, Mr. Rueckert did not cease to be the legal custodian of the balance of the money, nor did he thereby withdraw such balance from the registry of the court, so as to hold it in a personal rather than in an official capacity, or become liable to any action therefor in favor of the defendant in said original action. And the general rule is that, in order to charge a person as garnishee, the principal debtor must have a cause of action against him: *Carpenter v. Gay*, 12 R. I. 306; *Waldron v. Wilcox*, 13 R. I. 518; *Tucker v. Pollock*, 21 R. I. 317, 43 Atl. 369. Money in the registry of a court is wholly under the control of that court unless ⁴⁷⁰ there is some supervisory jurisdiction over the same, and cannot be paid out until an order is duly made for that purpose. And this being so, no argument is necessary to show that it is not liable to attachment by trustee process.

The following cases, together with many others which might be cited, support the view which we have taken, viz.: *Hunt v. Stevens*, 28 N. C. 365; *Drane v. McGavock*, 26 Tenn. 132; *Pace v. Smith*, 57 Tex. 555; *Ross v. Clarke*, 1 Dall. 354; *Mattingly v. Grimes*, 48 Md. 102. See, also, *American Bank v. Snow*, 9 R. I. 11, 98 Am. Dec. 364.

Exceptions overruled, and case remitted to the district court for further proceedings.

ATTACHMENT—SURPLUS PROCEEDS OF SALE.—PROPERTY IN CUSTODIA LEGIS cannot be attached: *Brewer v. Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804, 30 S. E. 81; but the surplus proceeds of the sale of property in the hands of an officer of the court, after satisfying an execution or other process, belongs to the judgment debtor, is not in custodia legis, and is, therefore, subject to garnishment or attachment by his creditors: *Oppenheimer v. Marr*, 31 Neb. 811, 28 Am. St. Rep. 539, 48 N. W. 818.

HOPKINS v. WHEELER.

[21 R. I. 533, 45 Atl. 551.]

WILLS—EXECUTION OF.—A WILL IS SIGNED IN THE PRESENCE OF THE TESTATOR, in legal contemplation, when it is signed by the witness at a table in one room, while the testator is in bed in an adjoining room, where the table is directly in front of the door, so that the testator can see the witness sign if he looks, and the witness can also see the testator.

WILLS—MENTAL CAPACITY—NONEXPERT WITNESSES—INADMISSIBLE OPINIONS OF.—It is not admissible, on the trial of an issue as to the mental capacity of a testator, to ask a nonexpert witness on the subject of mental capacity whether the testator was in a condition to make a will, as the question calls for the opinion of the witness as to the degree of mental capacity required by law for the making of a will.

WILLS—MENTAL CAPACITY—NONEXPERT WITNESSES—ADMISSIBLE OPINIONS OF.—Nonexpert witnesses, on the trial of an issue as to the mental capacity of a testator, should be permitted to testify to facts which they have observed bearing on the mental condition of the testator, and then to give their opinions as to his mental condition derived from those facts.

Probate appeal, heard on the appellant's petition for a new trial.

Franklin P. Owen, for the appellant.

Dexter B. Potter, for the appellee.

533 PER CURIAM. We think the testimony of the surviving subscribing witness shows the due execution of the will. The point claimed by the appellant is that she did not sign it in the presence of the testatrix, but the testimony shows that though the will was signed at the table in the parlor by the witness while the testatrix was in bed in an adjoining room, the table was directly in front of the door, so that the testatrix could have seen the witness sign if she had looked, and the witness could also have seen the testatrix. This was a signing, in legal contemplation, in the presence of the testatrix.

The appellant, during the trial, asked a witness who was **534** not an expert on the subject of mental capacity, whether the testatrix was in a condition to make a will. The question was objected to and the objection sustained. The appellant excepted to the ruling excluding the question. The question was clearly inadmissible in that it called for the opinion of the witness as to the degree of mental capacity required by law for the making of a will. The opinions which were allowed to be given by the witnesses other than the attesting witnesses were based on facts within the knowledge of the witnesses to which they had previously testified, and were simply the conclusions of the witnesses on such facts. The uniform practice in this court has been to permit nonexpert witnesses to testify to facts which they had observed bearing on the mental condition of the testator, and then to give their opinions as to his mental condition derived from those facts.

The necessity for considering the question raised by the appellant as to the competency of a legatee under a will to testify as to its execution does not exist, for even if the question were properly before us, as it is not, no exception having been taken as to the competency of the testimony, the due execution of the will is shown by the testimony of the survivor of the attesting witnesses.

New trial denied, and case remitted to the common pleas division for further proceedings.

WILLS—ATTESTATION IN TESTATOR'S PRESENCE.—A will may be regarded as attested in the presence of the testator, though the attestation did not take place in the room where he then was, and was not actually seen by him, if it took place within the range of his vision and might have been so seen, considering his position and state of health at the time. The true test is, not whether the testator saw the witnesses sign, but whether, considering his mental condition and his posture at the time, he might have seen them do so: Note to Burney v. Allen, 74 Am. St. Rep. 643.

WILLS—MENTAL CAPACITY—OPINIONS OF NONEXPERT WITNESSES—ADMISSIBILITY OF.—Mental capacity to make a will, or what in any case shall be the standard of legal capacity, is a question of law: *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 23 Atl. 160. A witness cannot be asked his opinion as to the capacity of a testator to make a will. Such inquiry involves a matter of law, and also assumes that the witness knows the degree of capacity required to perform the act in issue: *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459. A witness may testify as to facts concerning a testator's mental capacity, and may give his opinion concerning it, provided he states the facts upon which such opinion is based: *Purney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 South. 685; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82. A family physician may express an opinion upon the actual condition of his patient's mind, but it is not competent for him to give a direct opinion upon his patient's mental capacity to make a will: *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 23 Atl. 160.

PITTS v. RHODE ISLAND HOSPITAL TRUST CO.

[21 R. I. 544, 45 Atl. 553.]

A COURT OF EQUITY WILL PROVIDE FOR THE MAINTENANCE OF INFANTS out of their personal estate and the income of their real estate not only in cases in which the will does not authorize an allowance, but also where it expressly directs an accumulation of the income. It is essential, however, to the granting of the application that the infant should have such an absolute title or interest in the property or its income that the right of no other person will be affected by the allowance. Unless he has such an interest, the consent of any person entitled in remainder, whose estate may be diminished in value by the allowance, must be had before the application will be entertained.

EQUITY—ALLOWANCE TO INFANTS—WHEN PROPER.—If the income of the residue of a trust estate is, by the terms of a will, to be applied, in the discretion of the trustee, to the education of the testator's infant child, but no provision is made for its allowance out of such income, a court of equity may, where the other provisions of the will for the support of testator's wife and child are inadequate, order an allowance necessary for the maintenance of the infant out of such income, if the widow, being the only person besides the son whose interest will be affected by the allowance, joins in the bill asking for it.

Bill in equity.

George T. Brown, for the complainant.

Tillinghast & Tillinghast, for the respondent.

545 MATTESON, C. J. The purpose of the bill is to obtain an allowance for the maintenance of an infant out of his estate. The case is as follows:

Charles F. Pitts died in Providence on September 20, 1894, leaving a will which was duly admitted to probate. The complainants, Alice S. Pitts and William Franklin Pitts, are respectively the widow of the deceased and his only child, now about six and one-half years of age, and the former is also guardian of the person and estate of the latter. By the third ⁵⁴⁶ clause of the will certain unimproved real estate was devised to the widow, which she has sold, so far as she has been able, and the proceeds of which amount to \$1,785. This sum she has expended in the necessary support of herself and child. Besides this unimproved real estate devised to the widow in fee, certain other improved real estate situated in Providence and Cranston was devised to her for life, with a remainder in fee to the child. The estate is valued at \$12,000, and the income therefrom, when fully rented, amounts to \$600 per annum; but, by reason of the fact that some of the tenements have been vacant a part of the time, the payment of taxes and water rates, assessments for curbing and concreting of the sidewalks, the laying of drains, plumbing, piping, and other expenses for repairs and improvements on the property, its income has been wholly inadequate for the support of the complainants, and they were unable to pay the taxes assessed against the property in Providence, including an assessment for curbing for the year 1898, and portions of this real estate were, in June, 1899, sold for the payment of such tax, and the tax assessed against the same for the year 1899 and the water rates for the same year are now in arrears, and the collector of taxes of the city of Providence threatens to levy on the estate and cut off the water supply unless the tax and water rates are paid. The complainants allege that they have exhausted their resources to support themselves and to pay these taxes and expenses, and to this end the said Alice has mortgaged her household furniture, and the mortgagee has threatened to foreclose the mortgage.

The respondent, the Rhode Island Hospital Trust Company, was, by the will, appointed trustee of the estate of the minor, except the fee in the real estate, which was subject to the widow's life estate, and under the seventh clause of the will there is now in its hands, as trustee, the sum of \$3,500, and also the net accumulated income to this time, amounting to \$374.52, which fund and accumulated interest is directed by the will to be applied from time to time, in the discretion of the president for the time being of the trustee, for the necessary maintenance and proper education of said child after he

shall have ⁵⁴⁷ attained the age of fourteen years. The respondent also holds, as trustee, the residue of the estate and property given to it by the will, the principal of which, at the present estimated value of the investments thereof, amounts to \$16,910.14. The income of this second fund, under the provisions of the will, may be applied in the discretion of the trustee for the education of the child, but there is no provision for its application to his maintenance.

From the income of the second fund the trustee has paid over from time to time to the complainant Alice, as guardian of the infant William, \$50 annually, to be applied to the proper education of the infant, as by the will directed, this sum being, in the discretion of the trustees and officers of the respondent under the trusts of the will, a liberal allowance for the purpose, considering the age of the infant. The respondent and its officers do not consider that it has or they have any right or discretion to apply the income of the second fund to any other purpose than the education of the infant, though had they deemed that they had such right or discretion the respondent admits that in the straitened circumstances of the complainants, as from time to time represented to its officers, it and they would have gladly applied the residue of the income of the second fund to the relief of the complainants. The accumulated net income of this portion of the estate now in the possession of the respondent is \$528.85. By the eighth clause of the will the principal of the trust estate in the hands of the respondent, except the fund of \$3,500, is to be kept intact until distributed as follows: One-tenth of the principal, with the accumulations thereof, to the said child when he shall have attained the age of twenty-one years; one-tenth when he shall have attained the age of twenty-five years; one-tenth when he shall have attained the age of thirty years; and the remainder when he shall have attained the age of thirty-five years. By the third clause of the will, in the event of the decease of the child during the lifetime of the widow and before attaining the age specified, the entire income of the estate is given to the widow during her natural life. Subject to these dispositions of his estate, the testator, ⁵⁴⁸ in the event of the death of his son before attaining the specified age of thirty-five, leaving no issue surviving, gives and devises the principal of the residue of the estate to Mabel Ingalls, and in the event that she has deceased, to his heirs at law.

The bill prays that the trustee may be decreed to pay over to the guardian of the infant, for his proper support, maintenance, and education, the total amount of the accrued interest in the estate in its hands, and also to pay over to her such interest as shall accrue in the future, and such portions of the principal of the trust fund for the same purpose as to the court shall seem meet, and for general relief.

To provide for the maintenance of infants out of their personal and the income of their real estate is an old and well-recognized branch of equity jurisdiction. Maintenance may be allowed not only in cases in which the will does not authorize an allowance, as in the present instance, but also where it expressly directs an accumulation of the income. It is essential, however, to the granting of the application, that the infant should have such an absolute title or interest in the property or its income that the right of no other person will be affected by the allowance. Unless he has such an interest the consent of any person entitled in remainder, whose estate may be diminished in value by the allowance, must be had before the application will be entertained: *Greenwell v. Greenwell*, 5 Ves. 195; *Ex parte Kebble*, 11 Ves. 604; *Errington v. Chapman*, 12 Ves. 20; *Errat v. Barlow*, 14 Ves. 202; *Marshall v. Holloway*, 2 Swanst. 432; *McPherson on Infants*, 232-234; *Beach on Trusts and Trustees*, secs. 356, 357; *Allowance for Maintenance of Infants*, 11 Alb. L. J. 205.

In view of these principles we have reached the conclusion, after some hesitancy, that the bill makes a case for relief in so far as it asks for an allowance for the maintenance of the infant out of the income of the residue of the estate in the hands of the respondent. It was the evident intent of the testator that the income, at least, of this fund should be applied, first, to the benefit of his son, so far as it might be ⁵⁴⁹ needed, for his education; and, second, in case of his death before attaining the ages specified, when he was to receive the principal, the entire income should be paid to the widow, if living, during her life. No one else is entitled to any part of the income, for the gifts over, which are made expressly subject to the prior provisions for the benefit of the son and widow, are limited to the principal of the residue, thereby clearly excluding the accumulations of income. The widow, then, is the only person besides the son whose interest will be affected by any allowance to be made, and she has joined in the bill asking for the allowance.

Though the will limits the application of the income of the residue of the estate to the education of the son, it is difficult to see how it can be made available for that purpose unless it be also applied to his maintenance. The other provisions of the will which the testator made for the support of his widow and son not being adequate, as he doubtless supposed they would be, this income must be applied to the son's maintenance as well as his education, for unless he can be properly supported he will be in no condition to be profited by the education.

We will hear the parties further as to the extent of the allowance to be made.

EQUITY—PERSONAL ESTATE OF INFANTS—SUPPORT—JURISDICTION.—Courts of equity have, from time immemorial, upon proper application, assumed jurisdiction over the personal estate of infants, and the rents and profits of their lands, and applied the same to their support and education, and this without any special statute authorizing them to do so: See the monographic note to *Faulkner v. Davis*, 98 Am. Dec. 733, 735, on the power of equity over infants and their estates.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

MASON v. SOUTHERN RAILWAY COMPANY.

[58 S. C. 70, 36 S. E. 440.]

RAILROADS—NEGLIGENCE—FAILURE TO GIVE SIGNALS.—The failure of a railway company to give signals at a public crossing one mile from the place of accident is evidence of gross negligence in running the train.

RAILROADS—NEGLIGENCE—EVIDENCE.—In an action against a railway company to recover for the negligent killing of an infant, the ruling out of a question calling for the opinion of the engineer of the train as to what he would have done under the circumstances if his own child had been on the track is harmless error.

WITNESSES—CROSS-EXAMINATION.—The right to cross-examine a witness after he has been sworn is not destroyed by a failure to examine him in chief.

EVIDENCE—RES GESTAE—CONTRADICTION OF WITNESS.—In an action against a railway company for negligently killing an infant, statements made by the engineer in charge of the train, though not properly part of the *res gestae*, are admissible to contradict him.

TRIAL—NONSUIT.—If there is evidence tending to show negligence, a nonsuit is properly refused.

NEGLIGENCE—DAMAGES.—In an action to recover for a negligent killing, evidence of damages is not necessary to a recovery.

RAILROADS—TRESPASSERS—NEGLIGENCE.—While technically an infant of a few months, or of very tender years, may be a trespasser when it goes upon a railway track without permission or lawful authority, yet there are well-defined distinctions between adult and infant trespassers, and, in case of injury to an infant, such distinctions should be pointed out to the jury.

RAILROADS—NEGLIGENCE—INFANTS.—If the direct and proximate cause of an infant's death is the negligence of a railway company in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in

damages as if the proximate cause of the injury had been its negligence after discovering the child upon the track.

TRIAL—INSTRUCTIONS.—The jury need not be again instructed as to the effect of evidence, if such instruction is given at the time when the evidence is received.

T. P. Cothran, for the appellant.

A. H. Dean and J. A. McCullough, for the appellee.

72 GARY, J. The facts of this case are thus succinctly set forth in the preliminary statement prefacing the argument of the appellant's attorneys, and admitted to be correct by the respondent's attorneys, to wit: "Action for damages, nineteen hundred and ninety-nine dollars and ninety-nine cents, instituted in the court of common pleas for Greenville county, September 29, 1899, by Robert Mason, as administrator of Clara Belle Mason, deceased, for alleged negligent killing of intestate by defendant Southern Railway Company, near South Tiger trestle, in Spartanburg county, on Atlanta and Charlotte Air Line Railway, August 21, 1898. The intestate was a child sixteen months old, and was killed on the track, about seventy yards from a neighborhood crossing, near the house of her father, the plaintiff in this suit. Tried before Judge Gary and a jury at Greenville, November 22, 1899; verdict for plaintiff, nineteen hundred and ninety-nine dollars and ninety-nine cents. The plaintiff alleges that on the day named the child crawled unobserved from the plaintiff's house, which is near the track, and in full view, and got upon the track, the mother at the time having no servants about the place and being herself engaged in domestic duties; that the plaintiff was away from home at the time; that about a mile from the point of collision defendant's track crosses a public highway, and the mother was accustomed to watch upon the track for her children when the signals for that crossing were given; that upon the occasion in question, the defendant failed to give the signals, and if the signals were given the mother did not hear them; that while the child was seated upon the track, one of defendant's trains, which was behind time and run at unusually rapid speed, recklessly and with grossest negligence ran over the child and killed it; that at the time the child was seated on the track at a point where a neighborhood road or 'traveled place' crosses said track, and the required signals were not given; that the agents of the defendant knew the location of the plaintiff's house, and for almost a mile in the direction

from which the train approached, the track was straight; that the engineer and fireman ⁷³ saw the child upon the track in ample time to have stopped the train before striking it, and if they did not actually see and recognize it, they could, by the exercise of ordinary care in keeping a lookout, have seen and recognized it and stopped the train in time to avoid striking it. The specific acts of negligence, recapitulated in the complaint, are stated to be: 1. In not stopping the train after having observed the child in time to avoid the collision; 2. After first seeing the object, in not keeping a strict watch upon it, by which they would have recognized it as a human being in time; 3. In not keeping a proper lookout along this stretch of track, which ordinary care and a proper regard for life (human and animal) demanded, as well as the law of the land, which would have enabled the fireman or engineer to have seen the child in time. The remaining allegations of the complaint are formal, referring to the incorporation of defendant, the heirs at law of the intestate, the appointment of the plaintiff as administrator, and the amount of damages.

“The answer of the defendant admits its corporate existence; that the child was killed by its train; and denies the other allegations of the complaint. It alleges that the child was a trespasser upon the track at a place where she had no legal right to be, and where the servants of the company had no reason to suppose she would be; that as soon as she was discovered they did all in their power to avoid the accident; that the defendant owed no duty to the child, save to exercise ordinary care to avoid injuring it after discovery; that it was impossible for the engineer to have seen the child in time to avoid striking it, as the child crawled upon the track on the left side of the engine, when the train was not more than one hundred and fifty feet away, and too close for the engineer to avoid the collision. The defendant also pleads the contributory negligence of the parents.”

The appellant has argued the exceptions under the heads of evidence, motion for nonsuit, burden of proof, and judge's charge.

⁷⁴ Subdivision a of the first exception assigns error as follows: “(a) The presiding judge erred in admitting evidence to the effect that the defendant failed to ring the bell or blow the whistle for the Burnett crossing, a mile from the scene of the accident, for the reason that said testimony was irrelevant to the issue. This exception applies to the testimony of

Robert Mason, T. J. Burnett, Ida Mason, Henry Pinson, and William Smith upon this point, and the ruling of the presiding judge to this effect: 'I think the failure to blow the whistle or ring the bell is, according to law, evidence of negligence.' " The complaint alleges gross negligence and recklessness on the part of the defendant in running its train at the time the accident occurred. The answer sets up the defense of contributory negligence on the part of the infant's parents; the complaint also alleges that the highway crosses the defendant's track about a mile from the place where the collision took place; and when the statutory signals were given when approaching said crossing the mother of the child was accustomed to look out upon defendant's track to see if any of the children were in danger; that the defendant failed to give the statutory signals—at least she did not hear them on that occasion. Under these circumstances the circuit judge properly allowed the jury to consider this testimony in determining the proximate cause of the injury: *Mack v. South Bound R. R. Co.*, 52 S. C. 323, 68 Am. St. Rep. 913, 29 S. E. 905.

Subdivision b alleges error as follows: "(b) The presiding judge erred in refusing to allow the witness, J. D. Pettus, to answer the question: 'If it had been one of your own children on that track at the time, could you have done anything more to prevent striking it?' Such question being competent and relevant to show that degree of care exercised by the engineer after he discovered the child crawling upon the track." This question merely called forth an expression of opinion, and even if it could be regarded as erroneous, it was harmless.

Subdivision c is as follows: "(c) The presiding judge ⁷⁵ erred in refusing to allow the defendant to cross-examine the witness Ed. James, who was put up by plaintiff." When a witness is sworn, he becomes subject to examination in chief and to cross-examination. The right of cross-examination is not destroyed by the failure to examine in chief. This error was, however, cured when the defendant's attorney thereafter was permitted to cross-examine the witness.

Subdivision d is as follows: "(d) The presiding judge erred in overruling defendant's objection and allowing witness, Ed. Jones, to answer the question: 'Did Mr. Pettus say down there at the track that he thought it was a dog or a chicken until he got too close?' Answer. 'Yes, sir; he did.' Upon the ground that the declaration was not a part of the *res gestae*, and was irrelevant to the issue." When Pettus was on the stand, he

was asked if he did not say to Mason, the father of the child, when the train backed to the place where the collision took place, at the time Mason climbed up in the cab, that he thought it was a dog or a chicken on the track, and that he did not have time to stop then. He answered, "No." The foundation was properly laid for contradicting the witness, and the testimony was at least admissible for that purpose.

Subdivisions e, f, and g are as follows: "(e) The presiding judge erred in overruling defendant's objection to and allowing the witness, Hampton Mason, to answer the question, 'Did you hear the fireman say to the engineer, "If you had paid attention to me when I told you that there was something on the track, maybe this thing would not have happened?"' 'Yes, sir'; for the same reason as in d, supra.

"(f) The presiding judge erred in overruling defendant's objection to allowing the witness, Robert Mason, to answer the question: 'And did he (engineer) say, "I thought it was a dog or a chicken, until I got up close to it?"' 'Yes, sir'; for the same reason as in d supra.

"(g) The presiding judge erred in overruling defendant's objection to and allowing the witness, Ida Mason, to ⁷⁶ answer the question, 'Did you hear the engineer say to your husband that he thought that the child was a dog or a chicken, until he got too close to it'; for the same reason as in d, supra." They are disposed of by what was said in considering subdivision d.

The second exception is as follows: "The presiding judge erred in overruling defendant's motion for a nonsuit. (a) There was an entire failure of proof of negligence on the part of the defendant. (b) The evidence showed that the child was upon the track at a point where it had no legal right to be, and where the defendant is not presumed to have supposed that it would be; it was incumbent upon plaintiff to offer testimony tending to show that the child was discovered by defendant's agents in time to avoid striking it, and that they negligently failed after such discovery to avoid the disaster. There is total failure of the testimony upon both of these points. (c) It was error to hold that a child could not be a trespasser on a railroad track. (d) It was error to hold that the child was not wrongfully on the track. (e) It was error to apply the rule in *Danner's* case to the facts of the case at bar. (f) It was error to hold that the burden of proof was upon the defendant to show that the accident was unavoidable, that it could not be helped.

(g) There was no proof of damages." The defendant made a motion for a nonsuit on two grounds: 1. Because there was no negligence on the part of the railroad company; and 2. That there was no proof of damages resulting to the plaintiff in this case from the death of the child. The presiding judge, in overruling the motion for nonsuit, stated somewhat at length the reasons that induced him to refuse the motion.

The only questions, however, that are properly before this court for consideration are, whether there was error in refusing the motion for nonsuit on the grounds that there was an entire failure of testimony showing negligence, and that there was no proof of damages resulting "7" to the plaintiff from the death of the child. Without stating the different circumstances tending to show negligence, this court is satisfied that there was evidence tending to prove that fact.

We will next consider the second ground of the motion for nonsuit. Section 2316 of the Revised Statutes provides that "the jury may give such damages as they think proportioned to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought." In the case of *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, 7 S. E. 515, cited with approval in *Strother v. South Carolina etc. R. R. Co.*, 47 S. C. 375, 25 S. E. 472, the court says: "Again, it will be noticed that our statute, unlike many others of a similar character, does not speak of a pecuniary loss or injury, which might possibly tend to show that the injury for which damages are allowed was confined to the deprivation of some legal claim, susceptible of measurement by a pecuniary standard, but its language is much broader, and gives to the jury the right to award such damages as they might think proportioned to the injury resulting from such death." The statute and the cases construing it show that the second ground of the motion for nonsuit was properly overruled.

We have not considered whether the circuit judge erred in his interpretation of the rule in *Danner's* case, as his remarks in reference thereto were made in refusing the motion for a nonsuit. We are not, however, to be understood as approving his construction thereof.

The third exception alleges error as follows: "The presiding judge erred in holding, upon motion for a nonsuit, that the burden of proof was upon the defendant to show that the accident was unavoidable, that they could not help it, thus depriving the defendant of the option of putting up testimony

or not, as it may have been advised." This exception is disposed of by what was said in considering the second exception. But even if it be conceded that there was error, it was harmless.

Subdivision a of the fourth exception is as follows: ⁷⁸ "(a) The presiding judge erred in illustrating the law applicable to the case by the hypothetical case stated to the jury, for the reason that in the cases stated by him the driver upon the highway and a child upon the highway had the same right to be there; whereas, in the case at bar, the railroad company, at the point of accident, had the exclusive right to the use of its track; the illustration, therefore, was inapplicable." The only error of which the appellant complains is that the illustration was inapplicable. Even if it was inapplicable, it was not such as to mislead the jury.

Subdivisions b, c, d, e, f, and g are as follows: "(b) The presiding judge erred in refusing defendant's first request to charge, which was as follows: 'A railroad company owes no duty to a trespasser upon its track until the employes actually see him in a position of danger,' and in holding, 'An infant cannot commit a trespass,' it being submitted that said request embodied a correct principle of law applicable alike to adults and children, and that an infant may become a trespasser. (c) The presiding judge erred in refusing defendant's third request to charge, which was as follows: 'The law imposes upon railroad companies no duty to trespassers upon its track except the duty of exercising reasonable care not to inflict injury upon them after they are discovered'; and in holding, 'A child cannot become a trespasser; a child can do no wrong; it has no appreciation of right or wrong, and, therefore, can do no wrong.' It being submitted that said request embodied a correct principle of law applicable alike to adults and children. Every animate object upon the track must occupy the relation either of trespasser or of one lawfully there. (d) The presiding judge erred in refusing defendant's fifth request to charge, which was as follows: 'A railroad company owes no duty to trespassers to be on a lookout for them at a point where they have no legal right to be, and where the company has no notice that they will probably be.' It is submitted that this request embodied a correct principle of law applicable to the ⁷⁹ case. (e) The presiding judge erred in refusing defendant's sixth request to charge, which was as follows: 'The above rules apply equally to adults and children of very tender age. Up to the

point of discovery of the trespasser by the employés of the company, the duty of railroads to adults and children of tender years is exactly the same.' It is submitted that the request embodied a correct principle of law applicable to the case. (f) The presiding judge erred in modifying the defendant's seventh request to charge, by adding the following: 'That is true, unless they had been negligent in not discovering the child.' It is submitted that the defendant was entitled to the charge unqualified; the rule being that up to the point of discovery the defendant owed the child trespassing on its track no duty, and consequently could not be guilty of negligence in not discovering it." The seventh request is as follows: "7. After discovery of the child by the employés of the company, the duty of the company to children incapable of realizing their danger is higher than that due to adults. The employés may assume that an adult will heed the signals of danger and get off the track; an infant, however, cannot be assumed to possess this capacity, and the employés, upon discovering it, must use all reasonable effort to stop the train. This duty, however, does not arise until the perilous position of the child has actually been discovered by the employés." "(g) The presiding judge erred in modifying the defendant's ninth request to charge by adding the following: 'That I charge you, unless they were negligent in not seeing the child.' It is submitted that the defendant was entitled to the charge unqualified, the rule being as stated in (f) supra." The ninth request is as follows: "9. If the jury believe from the evidence that the employés of the company made every reasonable effort to avoid striking the child after discovering it upon the track, the company is not liable, and their verdict should be for the defendant."

The exception by these subdivisions raises two questions, to wit: 1. Was there error on the part of the presiding ⁸⁰ judge in charging the jury that the infant, by reason of its tender years, could not be a trespasser; and 2. Was there error in refusing to charge the jury that the law does not impose upon a railroad company any duty to trespassers upon its track, except the duty of exercising reasonable care not to inflict injury upon them after they are discovered.

We will first consider whether the presiding judge erred in charging that the infant, by reason of its tender years, could not be a trespasser. While, in strictness of law, an infant may be a trespasser when it goes upon the track of a railroad company without its permission or without lawful authority, there

are, nevertheless, well-defined distinctions between an adult and an infant trespasser. An infant sixteen months of age does not know right from wrong, and, therefore, when it goes upon a railroad track, it cannot be said that it intended to commit such an act as in an adult would make him a trespasser or wrongdoer; it cannot be guilty of contributory negligence; it is not amenable to criminal law, and is not liable in damages when an adult would be under similar circumstances. When all the remarks of the presiding judge are considered together, it will be seen that he drew the attention of the jury to this distinction, and although he was technically in error in saying that an infant could not be a trespasser, the jury, after his explanation, could not have been misled.

We will next consider whether there was error in refusing to charge that the law does not impose upon a railroad company any duty to trespassers upon its track except the duty of exercising reasonable care not to inflict injury upon them after they are discovered. The ruling of the presiding judge must be considered with reference to the fact that the infant was of very tender years, to wit, only sixteen months of age. The question whether a railroad company owes any duty to an infant trespassing upon its track until it discovers the infant has given rise to much discussion, and the authorities upon this subject are in irreconcilable conflict. Even conceding that a railroad company ⁸¹ is not bound, as a general proposition, to look out for trespassers upon its track, it, nevertheless, is bound to exercise ordinary care in running its trains. The law imposes upon it the duty of keeping a reasonable lookout for obstructions on its track. The safety of its passengers and the rights of the public generally demand the enforcement of this rule. It is a general rule of law that a railroad company is liable in damages for an injury inflicted by it, when its negligence was the direct and proximate cause of the injury. If the direct and proximate cause of the infant's death was the negligence of the defendant in failing to keep a reasonable lookout and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence after discovering the child upon its track: *Bottoms v. Seaboard etc. R. R. Co.*, 114 N. C. 699, 41 Am. St. Rep. 799, 19 S. E. 733; *Gunn v. Ohio Riv. R. R. Co.*, 42 W. Va. 676, 26 S. E. 546; *Wood's Railway Law*, 1275-1280.

Subdivision h is as follows: "(h) The presiding judge erred in not charging defendant's eleventh request to charge, which was as follows: 'If the jury believe from the evidence that an employé of the company has made a statement or declaration (after the accident and not a part of the *res gestae*) inconsistent with his testimony in this case, they may consider such inconsistency as tending to discredit his testimony, but not as independent evidence of the company's negligence.' It being submitted that such request embodied a correct principle of law applicable to the case." The plaintiff, in opening his case, offered in evidence the said declarations, but they were held to be inadmissible on the ground that they did not form part of the *res gestae*. The employés, when examined in behalf of the defendant, were cross-examined by the plaintiff in regard to the said declarations, and they denied making them. The plaintiff, in reply, then offered the witnesses originally produced to prove the declarations. The record shows that the following took place: "Mr. Cothran objects on the ground ⁸² that this question is irrelevant, and that counsel proposes to contradict the witness upon an irrelevant point, and submits that it can't come in unless it is part of the '*res gestae*,' and within the proper scope of his agency. The Court: The testimony must be relevant. I think it is competent. Mr. Cothran excepts. By Mr. Dean: Did Mr. Pettus say that you went back there to see whether the track was straight or curved? Mr. Cothran: I ask that your honor will instruct the jury upon the delivery of that testimony, that they can consider that testimony only for the purpose of discrediting the witness, if they believe this evidence. If they believe the statement to be true, and that the engineer is mistaken, then they can consider this testimony only to the extent of discrediting the engineer, and not for the purpose of introducing it as independent evidence. The Court: Yes, gentlemen of the jury, Mr. Cothran has stated the ground upon which the testimony is to be considered clearly to you, and it is correct." The request was not read to the jury, and there was no necessity to charge the proposition therein stated, as the jury had already been instructed upon the subject.

Subdivision i is as follows: "(i) The charge of the presiding judge was inconsistent, contradictory, and confusing to the jury. For instance, he charged the fourth and eighth requests, which we submit were good law, and qualified the seventh and ninth requests by holding that the defendant may have been guilty of

negligence in not discovering the child." When the charge of the presiding judge is considered in its entirety, it will be seen at a glance that the objections urged by the appellant are unfounded.

It is the judgment of this court that the judgment of the circuit court be affirmed.

RAILROADS—WARNING AT CROSSINGS.—The failure of the servants of a railroad company to comply with the statutory requirements as to signals, speed, etc., in approaching public crossings is admissible in evidence in a railway accident case to show negligence arising from a breach of duty due from the company to the person injured or killed: *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550. Moreover, in the absence of any statute regulating the time and manner of giving signals, the failure of an engineer to ring the bell or sound the whistle on approaching a crossing, where the approaching train is hidden from the view of the traveler, is negligence on the part of the railroad company: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884.

RAILROADS—CHILD ON TRACK.—A railroad company is bound to exercise a high degree of caution where persons may be upon its tracks, and if by failure to do so a child of tender years is injured, the company is liable in an action by the child, although its parent or custodian is negligent in permitting it to be on the track: *Bellefontaine etc. R. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175. See, too, *Alabama etc. R. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. Rep. 943, 25 South. 251.

RUSH v. AIKEN MANUFACTURING COMPANY.

[58 S. C. 145, 36 S. E. 497.]

LANDLORD AND TENANT—TRESPASS BY LANDLORD.—A landlord who, after the expiration of a lease, forcibly enters the premises and puts out the goods of his tenant, does not thereby become liable as a trespasser ab initio, nor do the rules governing bailor and bailee have any application in such case.

Henderson & Henderson, for the appellant.

J. R. Cloy and G. W. Croft & Son, for the appellee.

¹⁴⁹ GARY, J. The first paragraph of the complaint herein alleges the corporate existence of the defendant, its ownership, control, and operation of a large cotton factory in the town of Bath; also its ownership of other real estate in said town, consisting of a large number of tenement houses, which are rented to the operatives who work in said cotton mill. The

second paragraph alleges that Mary Rush was the owner of the personal property hereinafter mentioned, and that she and her husband were in lawful possession of one of the tenement houses, occupying the same as a dwelling. The other allegations of the complaint necessary to understand the questions raised by the exceptions are as follows: "3. That on the thirtieth day of November, A. D. 1898, while the said plaintiff was in lawful possession of the said house as aforesaid, and occupied the same as a dwelling, and where the said household goods and furniture were kept, and while plaintiff was temporarily absent from home, the said defendant, the Aiken Manufacturing Company, willfully, wrongfully, unlawfully, maliciously, and in a high-handed manner caused plaintiff's said dwelling-house to be broken by its codefendant and agent, William Birmingham, and unlawfully and recklessly seized the said household goods of the plaintiff, Mary Rush, and then and there, without authority or any notice whatever to either of the plaintiffs, wantonly, recklessly, wrongfully, maliciously and in a high-handed manner caused the said household goods and furniture to be put out and into the public street of the said town of Bath, and in the face of the gaze, ridicule, and gibes of the public, placed them down in a wet and muddy place, and there left them unprotected. 4. That by reason of the facts above set forth, the plaintiff was left without a home, was greatly delayed in the effort to get her said household goods removed to a safe place, that the goods were by the acts of the defendants badly injured by being saturated with kerosene oil, broken, and thrown in the mud. 5. That the acts of the defendants were high-handed, unlawful, and malicious, and greatly outraged plaintiff's feelings and laudable ¹⁵⁰ pride, and exposed her to the gibes, taunts, and ridicule of the public, for all of which acts and grievances aforesaid, plaintiff, Mary Rush, has been damaged in her property injured in her person and feelings to her damages in the sum of three thousand dollars."

His honor, the presiding judge, in his charge to the jury, used the following language: "You will understand this complaint contains two causes of action—one for breaking her house and the other for damaging her property—and really there is another for damage to her feelings; those two are not separated." The jury rendered a verdict in favor of the plaintiff for five hundred dollars. The defendants appealed upon exceptions.

The practical question raised by the first, fourth, sixth, and seventh exceptions is whether there was error on the part of the circuit judge in charging the jury that even if the tenancy had terminated, the defendant did not have the right to use violence in making a re-entry until a reasonable time had expired, or due diligence had been used to ascertain if the plaintiff asserted a right to the premises after the expiration of the tenancy, and if they asserted such a right, that the defendant could only eject them by process of law. In the case of *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. 339, Mr. Chief Justice McIver uses this language: "The question now presented is analogous to the question which has frequently arisen both in this country and in England, and this analogy has been recognized in many of the cases, and that is, how far a landlord who gains by force the possession of the demised premises after the possessory right of the tenant therein has determined, can be held subject therefor to any other liabilities than those which the statutes of forcible entry and detainer have expressly annexed to this act. This question has been very fully considered in 4 *American Law Review*, 429, and the authorities down to that time (April, 1870) elaborately reviewed. It is there shown that the idea that one who has authority to enter, and abuses that authority, either by unnecessary force in making the entry ¹⁵¹ or by some illegal act done after the entry has been effected, thereby becomes a trespasser ab initio, so as to make even his entry a trespass, is based largely upon two English cases—*Hillary v. Gray*, 6 Car. & P. 284, and *Newton v. Harland*, 1 Man. & G. 644—the former of which was a *nisi prius* decision, and the latter has been distinctly repudiated; and the rule in England now is that, though the landlord may be liable to an indictment for using force in making the entry, or to a civil action for damages for committing any trespass upon the person of the tenant, either in making the entry or after he has entered, provided a proper case to that end is made, yet he cannot be made liable as a trespasser ab initio on the real estate, because of the use of force in making the entry, or because of the trespass upon the person of the tenant." He reviews the cases in this state, and shows that his conclusion is not only sustained by them, but by the overwhelming weight of authorities elsewhere. The article in 4 *American Law Review*, to which the court referred, throws much light upon the question under consideration. There are expressions in the cases of *Johnson v. Hannahan*, 1 Strob. 313, and *Sharp v. Kins-*

man, 18 S. C. 108, which are not in accord with the views herein announced, but we are satisfied that the true doctrine is stated in *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. 339. See, also, *Smith v. Detroit etc. Bldg. Assn.*, 115 Mich. 340, 68 Am. St. Rep. 594, 73 N. W. 395.

We will next consider the fifth exception. As every act of the defendant in connection with the personal property was alleged to be unlawful, and it did not retain the possession thereof, we fail to see how the question of bailor and bailee has any application to this case. The conclusion which we have reached in considering the foregoing exceptions renders speculative the other questions in the case.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

152 Jones, J., concurs in result.

McIVER, C. J., concurring in result. As I understand it, the rule in this state is, that where the tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commits no trespass upon the real estate in so doing, even if force is used in making such entry; and, therefore, in such a case, he is not liable to a civil action for trespass. If, however, the landlord in making such entry commits a trespass upon the person of the outgoing tenant or upon his personal property, he may be liable to a civil action for such trespass. But the simple removal of the tenant's personal property from the premises which had been rented does not constitute a trespass, unless it is effected by the use of unnecessary force whereby such property is destroyed or injured.

LANDLORD, RE-ENTRY BY.—AT THE EXPIRATION of a notice to quit, after the termination of the term, a tenant becomes a trespasser, and the landlord may enter the premises during the tenant's absence, take possession and remove the tenant's goods, without legal process, and the tenant has no right to re-enter: *Smith v. Detroit Loan etc. Assn.*, 115 Mich. 340, 69 Am. St. Rep. 575, 73 N. W. 395. A landlord may forcibly eject a tenant after the expiration of his lease: *Allen v. Keily*, 17 R. I. 731, 33 Am. St. Rep. 905, 24 Atl. 776.

BARRON v. WILLIAMS.

[58 S. C. 280, 36 S. E. 561.]

FRAUDULENT CONVEYANCES—GIFT OF LIFE INSURANCE POLICY—HUSBAND AND WIFE.—A gift by an insolvent husband to his wife of a policy of insurance on his life, exempt from execution, is not a fraud on existing creditors.

ASSIGNMENTS.—POLICIES OF LIFE INSURANCE may be assigned by parol.

G. W. S. Hart, for the appellants.

T. Y. Williams, for the assignee.

281 JONES, J. The object of this action is to determine the ownership of a policy of insurance issued November 22, 1888, by the Equitable Life Assurance Society, on the life of Walter T. Barron, who died intestate January 21, 1899. The policy was made payable "to Walter T. Barron, his executors, administrators, or assigns." The plaintiff, as administrator of Mary L. Barron, who died intestate February 12, 1899, claims the policy under an alleged gift by Walter T. Barron to his wife, Mary L. Barron. The defendant, D. E. Finley, claims the policy under a deed of assignment for the benefit of creditors, executed to him as assignee June 2, 1896, by the firm of Kennedy Brothers & Barron, of which Walter T. Barron was a member, and by Walter T. Barron individually. This assignment conveys all the individual and partnership property of the assignors not exempt from levy, attachment, and sale as a homestead, but does not mention specifically the policy of insurance. In the event the transfer to Mary L. Barron is not sustained, the plaintiff and the five defendants last named in the title of this cause as surviving children of Walter T. Barron and Mary L. Barron, claim that the policy should go to them as part of the homestead exemption of their father. The circuit court held that there was no transfer of the policy by Walter T. Barron to Mary L. Barron; that the policy passed to the assignee, D. E. Finley, under the assignment for creditors; but that Mary L. Barron having paid the premiums on the policy from the date of the assignment to the death of Walter T. Barron, her administrator was entitled to such a proportion of the fund as the payments she made bears to the whole number of payments.

We think the preponderance of the evidence is clearly against the conclusion of the circuit court, that there was no transfer

of the policy by Walter T. Barron to Mary L. Barron. Indeed, we fail to find anything in the evidence to sustain the conclusion of the decree below. The plaintiff testified positively that his father, Walter T. Barron, in 1894, delivered to his mother, Mary L. ²⁸² Barron, a policy in the Equitable Life Assurance Society on the life of Walter T. Barron, saying to her: "This is yours; put it up; keep it." This is corroborated by Elizabeth E. Barron, one of the defendants, a daughter of Walter T. Barron, who testified that more than two years previous to July, 1896, when her brother, Lapsly, died, her father delivered to her mother a policy in the Equitable Life Assurance Society, saying: "This is yours; put it away in a safe place." The identity of the policy in question with the policy referred to by these witnesses is shown by the testimony of an officer of the Equitable Life Assurance Society, that said company issued but one policy on the life of Walter T. Barron. There is no imputation whatever against the character and credibility of these witnesses. Their evidence was objected to as incompetent under section 400 of the code. It does not appear that this objection was ruled upon by the circuit court, nor is such ruling, if any, questioned by any exception; but as we are relying upon said testimony, we may say in passing that the testimony was not objectionable under section 400, because it was not in regard to any transaction or communication between such witness and the deceased person. This evidence was further corroborated by a letter addressed by Walter T. Barron to his wife, Mary L. Barron, dated November 30, 1898, during his last illness, which was found in his pocket after his death. In this letter, among other matters not necessary to mention, Walter T. Barron wrote: "First collect the insurance; it is all yours." The policy was never delivered to the assignee under the deed of assignment for creditors, nor, as stated, was it referred to specifically in the deed of assignment; on the contrary, the policy remained in the possession of Mary L. Barron, and after her death it was found in her private desk. In the listing and valuation of the personal property of Walter T. Barron, made by Joseph F. Wallace, a short time after the assignment of June 2, 1896, no mention is made of this policy. In the absence of any evidence to the contrary, we are satisfied that Walter T. Barron gave this policy to his wife previous to the deed of ²⁸³ assignment. But it is argued that such a voluntary transfer was fraudulent and void as against Walter T. Barron's existing creditors. In order to avoid a gift by

the husband to the wife for fraud, it is incumbent on the creditors to show that the gift was detrimental to their rights. As stated in *Bridgers v. Howell*, 27 S. C. 434, 3 S. E. 790: "There can be no fraud, either actual or constructive, in a debtor putting beyond the reach of the ordinary process of law, funds or property which by law are exempt from the payment of a debt, for the reason that the creditor is not thereby deprived of any right or impeded in the enforcement of it." So in *Finley v. Cartwright*, 55 S. C. 198, 33 S. E. 359, it was held that an insolvent debtor, who is the head of a family in this state, may, as against his creditors, convey his homestead to his wife. It was incumbent, therefore, on the contestee, assignee for creditors, to show that at the time of this transfer or gift of the policy to his wife, the homestead exemption would not protect this property from creditors. It does not appear what amount of personal property was owned by Walter T. Barron at the time of the gift to his wife, but it does appear that Mr. Barron's personal property was valued by Mr. Wallace about June, 1896, and found to be three hundred and thirty-five dollars. This did not include thirty-four dollars and eighty-nine cents, money on deposit in the Loan and Savings Bank, in the name of Walter T. Barron. There was evidence to show that the cash surrender value of the policy on June 2, 1896, the date of the assignment to D. E. Finley for creditors, was only ninety-four dollars and fifteen cents. From this evidence alone, the proper inference is that at the time of the transfer of the policy to Mrs. Barron, Mr. Barron did not own personal property exceeding his homestead exemption; hence the transfer could not be in fraud of the rights of creditors. We may add that a policy of insurance, like any other chose in action, may be transferred by parol, unless some unwaived provision in the policy forbids it. We find nothing in the policy forbidding such a transfer. The insurance company makes no question on that score, but by a consent order has paid the fund,²⁸⁴ two thousand six hundred and forty-one dollars and twenty-four cents, into the hands of the clerk of the court for the person entitled to the same. Our conclusion above disposes of the case, and it is unnecessary to consider further. The administrator of Mary L. Barron is entitled to the fund in court.

The judgment of the circuit court is, therefore, reversed and the case remanded, with instruction to the court below to order the whole fund, two thousand six hundred and forty-one dol-

lars and twenty-four cents, paid to the plaintiff, as administrator of Mary L. Barron.

FRAUDULENT CONVEYANCE.—THE TRANSFER OF EX-EMPT property by a husband to his wife is not a fraud on his creditors: *Wells v. Anderson*, 97 Iowa, 201, 59 Am. St. Rep. 409, 66 N. W. 102.

AN ASSIGNMENT OF A LIFE INSURANCE policy by an insolvent husband to his wife is valid as against his creditors: *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116. See, further, the note to *Hise v. Hartford Life Ins. Co.*, 29 Am. St. Rep. 364.

A PAROL ASSIGNMENT OF A LIFE INSURANCE policy is valid: *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116.

DE LANEY v. GEORGIA, CAROLINA & NORTHERN RAILWAY COMPANY.

[58 S. C. 357, 36 S. E. 699.]

NUISANCE.—A GRANTEE OR LESSEE is liable for the continuance of a private nuisance only when he has increased it, or has been notified thereof, and demand has been made for its removal.

APPELLATE PRACTICE—AMENDMENT OF PLEADINGS. If a complaint is dismissed as to a demurring defendant, and the case proceeds against other defendants to judgment, which is not appealed from, the supreme court cannot remand the case for the amendment of the complaint against such dismissed defendant.

Green & Hines, for the appellant.

J. L. Glenn and T. Y. Williams, for the appellees.

358 JONES, J. This appeal is from an order sustaining a demurrer to the complaint pleaded by the two last-named defendants on the ground that as to them it failed to state facts sufficient to constitute a cause of action. The complaint alleges in substance that the Georgia, Carolina & Northern Railway Company, in building its roadbed over a watercourse on plaintiff's land, negligently constructed a culvert too narrow to permit the volume of water to pass through without flooding, and thereby flooded plaintiff's land, injuring said land and destroying his crops. After alleging a lease of said railroad, etc., by the Georgia, Carolina & Northern Railway Company to the two last-named defendants, and stating particulars and damages, the complaint alleges that said lessees since said lease "kept and

maintained, with full knowledge of its unlawful and negligent construction and without any effort to remedy it, the culvert before named, to the continuous damage of this plaintiff, as above alleged." The complaint did not allege the placing of any obstruction over ³⁵⁹ said stream by the demurrants, nor the increase by them of the obstruction alleged to have been made by their lessor, nor did the complaint allege any demand upon the lessees for the removal of said obstruction.

The fundamental principle governing questions of this kind is that, in order to constitute a cause of action, the complaint must show a delict or breach of duty by defendant violative of plaintiff's right. Therefore, in *Hammond v. Port Royal etc. R. R. Co.*, 16 S. C. 574, the complaint was not demurrable because the allegations practically amounted to a statement "that the defendant had obstructed the drainage of plaintiff's land by closing up certain ditches necessary to secure that end," such positive acts constituting the delict alleged. Hence, with reference to such a complaint, the court held it error to charge the jury that defendant, the grantee, was liable for any damages caused by the failure to remove the obstruction caused by the acts of the former company, the grantors. So (as applied to the case before the court in that action) the principle was announced that the mere failure of the grantee to remove obstructions placed by the grantor affords no cause of action against the grantee, the court stated that "the plaintiff must go further, and show that by some act of the defendant the plaintiff's system of drainage has been obstructed, or that the obstructions caused by the former company have been increased." But it should not be understood that *Hammond's* case meant to assert that in every action against the grantee for the continuance of a nuisance created by the grantor it was essential to allege and show that the grantee increased the obstructions constituting the nuisance. That is merely one way by which the delict of defendant may be shown, and was a proper way under the complaint in that case. We understand it also to be the law in this state that the grantee or lessee of the creator of an obstruction constituting a private nuisance has no duty to remove said obstruction until after notice and demand for removal; but after such notice and demand the continuance of the nuisance ³⁶⁰ becomes a nuisance, and the duty to remove or compensate arises: *Elliott v. Rhett*, 5 Rich. 420; *Leitzsey v. Columbia Water Power Co.*, 47 S. C. 476, 25 S. E. 744; *Townes v. City Council of Augusta*, 52 S. C.

404, 29 S. E. 851. In such a case it would not be essential to allege the placing or the increasing of the obstruction by the grantee, since the delict could be shown by the continuance of the original nuisance after notice and demand for removal. But in the present case it was alleged that the lessor or grantor placed or created the obstructions, and it was not alleged that notice and demand for removal was made upon the grantee or lessee; therefore, it was not error to sustain the demurrer for failure to allege that the grantee or lessee increased the obstructions made by the grantor or lessor. The ruling of the circuit court is directly supported by the case of *Privett v. Wilmington etc. R. R. Co.*, 54 S. C. 98, 32 S. E. 75, which was largely based upon the principles stated in *Hammond v. Port Royal etc. R. R. Co.*, 16 S. C. 574.

After the dismissal of the action against the two demurring defendants, the plaintiff chose to proceed with the case against the Georgia, Carolina & Northern Railway Company, and recovered a judgment for damages for the construction and maintenance of obstructions complained of, from which judgment there is no appeal. In such a case, it would not be proper to remand the case with leave to amend.

Judgment of the circuit court is affirmed.

NUISANCE.—IF A TENANT creates a nuisance without the authority of the landlord, the latter is not liable. However, a grantee of premises on which there is a nuisance is not liable if he merely suffers it to remain, unless he is first asked to abate it: *Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757. Where premises are leased with a nuisance upon them, the landlord is liable; but for a nuisance occasioned by the negligence of the lessee he is not answerable: *Note to Wunder v. McLean*, 19 Am. St. Rep. 704.

HUNTER v. HUNTER.

[58 S. C. 382, 36 S. E. 734.]

WILLS—CONSTRUCTION—TRUSTS.—A will devising "all the rest and residue of my estate, both real and personal, to my wife, for and during her lifetime, to support herself and my children and to educate" them, creates a trust estate in life for the wife for the benefit of such children, but without power to sell the trust estate.

EXECUTORS AND ADMINISTRATORS—SALES BY—PROCEEDINGS TO SUPPORT.—If the proceedings of the probate court fail to show any judgment or order of sale made by that court authorizing a sale of land by the executor of a decedent, and there is no evidence aliunde to show that such order of sale was ever made, the proceedings are insufficient to support such sale.

JUDGMENTS—PRESUMPTION OF RENDITION.—If the record shows no final judgment, and only that certain steps leading up to a judgment have been taken, the fact that such judgment has been rendered cannot be presumed.

WILLS—TRUSTS—REMAINDERMEN.—If a life estate is given by will to a person without power of sale and burdened with a trust for the support of the trustee and the children of the testator, and the trustee violates the trust by selling the land, the children may maintain an action against the trustee and the purchaser to preserve their rights in the trust estate.

EXECUTORS AND ADMINISTRATORS—VOID SALES—SUBROGATION.—If an executor sells real estate, and uses the proceeds in the payment of the testator's debts under a mistake of his powers under the will, the purchaser has the right to be subrogated to the claims which he has by his purchase paid, and he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled.

The following is the will referred to in the opinion: "The state of South Carolina, Laurens county. I, Samuel M. Hunter, of the county and state aforesaid, do make and ordain this my last will and testament in manner and form as follows, to wit: 1st. I direct my executrix to pay my just debts and funeral expenses, and to erect a suitable monument over my grave, out of the proceeds of any of my personal property that she can best spare. 2d. I will all the rest and residue of my estate, both real and personal, to my wife, Nannie W. Hunter, for and during her lifetime to support herself and my children and to educate my children. 3d. I hereby authorize my wife to give to my children, as they may severally go to housekeeping, such of my property as she may deem proper for them to have and such as she may think she can spare, and to keep an account of it so as to make all my children equal in the final division of my estate at the death of my said wife. 4th. At the death of my wife, I will that all my property then left, after supporting and educating the family and children, shall be equally divided among my children living at the death of my wife. If any of my children should die in the lifetime of my wife leaving a child or children living at her death, such child or children shall take the share of the deceased parent in my estate. At the death of my wife, I direct that all of my estate, both real and personal, that may be left after supporting the family and educating my children, shall be divided among my children living at my wife's death and the children of any of my children that may die in the lifetime of my wife, by four disinterested and competent men, to be selected by my children—without the aid or interference of any court—the children of a deceased child to take the parent's share. 5th. I appoint my

wife, Nannie W. Hunter, executrix of this my will during her lifetime; at her death, I appoint my sons, Eugene, Samuel, Stokes, and William Mills, executors of this my last will, also my son Melmoth Leander. S. M. Hunter. [L. S.]”

Haynsworth, Parker & Patterson and Ball, Simpkins & Ball, for the appellants.

N. B. Dial and W. H. Martin, for the appellees.

385 McIVER, C. J. On the twenty-fifth day of April, 1883, S. M. Hunter, having first duly made and executed his last will and testament, departed this life, leaving surviving him his wife, the defendant Nannie W. Hunter, and his children, who are the plaintiffs in this case. The said Nannie W. Hunter was the duly appointed and qualified executrix of the will of her husband; and as such she made deeds to S. M. Nabors, A. Y. Thompson, and E. J. Fleming, purporting to convey to these persons in the different proportions mentioned in the complaint, a tract of land lying in the county of Laurens, which deeds bear date respectively as follows: That to S. M. Nabors on the 9th of May, 1885; that to A. Y. Thompson on the 8th of August, 1885; and that to E. J. Fleming on the 18th of November, 1885. It seems that some proceeding was instituted in the court of probate for Greenville county, exactly when does not appear, though from such portions of the record of that proceeding as were introduced in evidence, it was probably early in January, 1885, the object of which seemed to be to obtain an order for the sale of the real estate of the testator in aid of the personalty to pay his debts, and also for the purpose of enjoining creditors from suing the executrix at law, and requiring them to prove their claims under that proceeding, for there is an order to that effect, but there is no order for the sale of the real estate, and there is no evidence that any order of sale was ever granted. The present action was brought by the plaintiffs, comprising all of the children of the testator, against the said Nannie W. Hunter, and the **386** other defendants, who claim title to the land in question under the sales made by the said Nannie W. Hunter, as aforesaid, in which the plaintiffs claim that the said Nannie W. Hunter had no authority, either as executrix or otherwise, to sell any of the real estate of the testator; that the life estate given to her by the will was given to her in trust for the support of herself and the children of testator, and also for the education of said children; that the

said Nannie W. Hunter has never performed the trust imposed upon her, but, on the contrary, has deprived herself of the means of doing so by selling the land as aforesaid, which constituted the principal part of the testator's estate; wherefore, the plaintiffs demand judgment "that said Nannie W. Hunter may be removed as trustee of the said life estate, and that the said will be construed by this court, and that it be declared that the said life estate is subject to the support of these plaintiffs, and that the rents and profits thereof be apportioned between the said Nannie W. Hunter, or her grantees, and these plaintiffs, and that the said Nannie W. Hunter and her grantees do account to these plaintiffs for all rents and profits heretofore derived from said land; and that it be declared that, after the termination of said life estate, these plaintiffs are the owners in fee simple of the said lands, and for the costs of this action." To this complaint the defendant Nannie W. Hunter filed no answer, but the other defendants, who are in possession of the land claiming under the sales above mentioned, answered, setting up, amongst other things, the claim that Nannie W. Hunter had authority, as executrix, to sell the land; or that, at least, she took a life estate therein, unencumbered with any trust, which estate she had a right to sell and has sold. And as a further defense, they claim the said Nannie W. Hunter had authority to sell the land under the proceedings in the court of probate above mentioned; that the lands were purchased at their full value, and that the proceeds of the sale were applied to the payment of the debts of the testator, and to the support and education of his children, the plaintiffs herein. They ³⁸⁷ also claim that said sales were made with the knowledge, consent, and approval of the plaintiffs. Finally, they plead the statute of limitations—the action, it appears, not having been commenced until the 30th of June, 1899. Upon the pleadings thus briefly stated, the case came on trial before his honor, Judge R. C. Watts, when the testimony set out in the "case" was introduced. The only portion of the testimony which, under the view we take of the case, we deem it necessary to state, is that portion of Mrs. Nannie W. Hunter's testimony in which she states that the entire proceeds of the sale of the land were applied by her to the payment of the debts of the testator; and this testimony does not anywhere appear to have been denied. The circuit judge, taking the view that Nannie W. Hunter, under the will, took a life estate unencumbered with any trust, she had a right to sell that estate; and hence, without consid-

ering any of the other questions in the case, held that the action was prematurely commenced, and therefore rendered judgment dismissing the complaint, with costs. From this judgment plaintiffs appeal upon the several exceptions set out in the record; and, in accordance with the proper practice, respondents have given notice that if this court finds itself unable to sustain the judgment of the circuit judge upon the ground upon which he rested it, they would ask this court to sustain such judgment upon the grounds set out in the record.

We do not deem it necessary to set out these exceptions and these additional grounds in *haec verba*, but think it will be sufficient to state the questions which these exceptions and grounds raise. 1. Is there anything in the will which justifies the inference that the testator intended to invest his executrix with the power to sell his real estate? 2. Was the life estate given to the wife unencumbered with any trust in favor of the children; and, if so, is there anything in the will which justifies the inference that the testator intended to invest his wife with the power to sell such life estate? 3. Did the executrix derive any power to sell the land in question from the proceedings in the court of probate ³⁸⁸ of Greenville county? 4. If the sale was made without authority, does the fact that the proceeds of such sale were applied to the payment of the debts of the testator entitle the defendants to be subrogated to the rights of the creditors whose claims were satisfied by their money; and have they the right to retain possession of the property so purchased until they have been repaid the amount so paid by them?

The first of these questions depends upon the construction of the will as a whole, and for this reason a copy of the same should be incorporated by the reporter in his report of the case. It is quite certain that the will contains no express authority to the executrix to sell any portion of his estate, though the terms of the first clause might be sufficient to warrant the inference that the testator intended to invest his executrix with the authority to sell his personal property, if the same became necessary to effect the purposes therein indicated; but there is not a word in the will, so far as we can discover, which indicates an intention on the part of the testator to invest his executrix with power to sell his real estate. Indeed, this question was not seriously discussed at the hearing, and may be dismissed without further remark.

2. This question is more important, and is, in fact, one of the turning points in the case; and as we differ with the circuit judge in the view which he has taken as to this point, we have examined this question with great care. The question naturally divides itself into two branches: (a) Was the life estate given to the wife encumbered with any trust? (b) If so, was there any power conferred upon the executrix to sell such life estate thus held by her in trust? As to the first branch of the inquiry, it seems to us that the case of *Wylie v. White*, 10 Rich. Eq. 294, cited by counsel for appellants, is conclusive. The testator, after providing, in the first clause of his will, for the payment of his debts and funeral expenses, and for the erection of a monument over his grave, "out of the proceeds of any of my personal property that she [the executrix] can best spare," 389 proceeds, in the second clause of his will, as follows: "I will all the rest and residue of my estate, both real and personal, to my wife, Nannie W. Hunter, for and during her lifetime, to support herself and my children and to educate my children." It will thus be seen that the testator not only expressly declared the quantity of estate which he gave to his wife, but also the purpose for which it was given to her. It was not given to her in such terms as would import that he intended his wife to take the bounty provided for her as her own absolutely, to dispose of as she should think fit; but, on the contrary, the purposes for which it was given were distinctly declared. There are no words used in this or in any other clause of the will which indicate that the testator merely hoped or expected, or had a confident belief, that his wife would use the property for the support of herself and the children, and for the education of the children, which expressions have sometimes been construed to be mere precatory words. On the contrary, the words used expressly declare the purposes for which the property was given to her for her life, and to those purposes it must be devoted. If so, then the language used is not only quite sufficient to create a trust, but must be so construed, even though the word "trust" is not used, in order to insure the accomplishment of the purposes for which the property is declared to have been given. For, as we said in *Wylie v. White*, 10 Rich. Eq. 294: "To create a trust, it is not necessary that the word should be employed in the instrument. It was said by Lord Eldon, in *King v. Dennison*, 1 Ves. & B. 273, that the word 'trust' not being made use of, 'is a circumstance to be attended to, but nothing more'; and if the whole

frame of the will creates a trust for the particular purpose of satisfying which the estate is devised, the law is the same, though the word 'trust' is not used." And again, quoting from Hill on Trustees, 65: "Thus when a gift in a will is expressed to be for the benefit of others, or to be at the disposal of the donee for herself and children, or toward her support and her family, or to enable the donee to provide for or maintain his children, ³⁹⁰ or where the gift is expressed to be made to the end or to the intent that the donee should apply it to certain purposes, in all these cases the terms employed have been held sufficient to fasten a trust upon the conscience of the donee, showing that in every case the general purpose and intention of the donor, and not the use of one particular term or another, will decide the question whether a party does, or does not, take in a fiduciary character." These authorities, based as they are upon sound reason and common sense, satisfy us that this will should be construed as creating a trust in the wife for the accomplishment of the purposes declared by the testator. If so, it is clear, then, that the life tenant could not sell even her life interest, unless something can be found in the instrument creating the trust which would invest the life tenant with power to sell the life estate. This renders it necessary to consider the second branch of the inquiry: (b) Is there anything in the will which invests the life tenant with power to sell the life estate? It is quite certain that there is no such express grant of power in the will, and, if such power is conferred at all, it must be by implication. The contention, as we understand it, is, that such power may be implied from the following language used in the fourth clause of the will: "At the death of my wife, I direct that all of my estate, both real and personal, *that may be left* after supporting the family and educating my children, shall be divided among my children"; and stress is laid upon the words which we have italicized, as implying that the testator intended and expected that some, at least, of the property should be sold. In view of the undisputed fact that some of the property left by the testator consisted of such things as would be consumable in the use, such as provisions, farming produce, horses, mules, and farming implements, it seems to us that the most natural inference to be drawn from these words would be that the testator meant all of his property except such as might be consumed in the use for which it was given—all that may be left or all that remained after it had been applied to the uses for which it was

³⁹¹ intended; rather than that the testator intended by those words, by implication, to invest the life tenant with the power of sale—rather a remote and strained implication by which to create so important a power as that of sale. This view is supported by the authorities cited in the argument, which need not be dwelt upon here; for even if it could be assumed that the testator intended, by the words relied upon, to invest the life tenant with power to sell, yet it is very obvious that, if such a power was conferred, it was conferred solely for the purpose of effecting the primary object of the testator—the support of the family and the education of the children—and there is no pretense that the sale was made for any such purpose; but, on the contrary, the undisputed fact is that it was made for the payment of the debts of the testator, and that every dollar of the proceeds of such sale was applied to such debts, we need not consider this point further. It was also contended that if the life estate was originally unencumbered with a trust, it terminated when the children attained their majority. We are unable to discover in the terms of the will any warrant for such a contention, and it may, therefore, be dismissed without further consideration.

3. The next general inquiry is whether the sales of the land in question can be supported by the proceedings of the court of probate for Greenville county. Passing by any other questions raised or that might be raised, in reference to the effect of these proceedings, a conclusive answer to this question is found in the fact that those proceedings do not show that any judgment or order of sale was ever made by that court; and there is no evidence aliunde tending to show that any order of sale was ever made. The record of those proceedings, as offered in evidence, was, manifestly, not complete; and, while it may be true that where a partial record does show that a final judgment was rendered by a court of competent jurisdiction, and the only defect in the record is the absence of certain steps leading up to the judgment, the court may infer from such judgment that the ³⁹² necessary steps to be taken before such judgment could be properly rendered had been taken. But where there is no final judgment, and the record only shows that certain steps leading up to the judgment had been taken, the fact that a judgment had been rendered cannot be inferred: *Brown v. Coney*, 12 S. C. 144. Indeed, the testimony aliunde in this case rather tends to show that no order of sale was ever granted by the court of probate, but that Mrs. Nannie W.

Hunter, being advised by her father, who is characterized in the circuit decree as a lawyer of high character and many years' experience at the bar, that she had authority as executrix to make the sales, abandoned the proceeding in the court of probate before it culminated in any final judgment, and made the sales as executrix, for the deeds on their face so show, and they are signed by her as executrix; and no allusion whatever is made in these deeds to any proceeding in the court of probate. It is clear, therefore, that she derived no authority to sell this land from such proceedings.

Holding these views, we cannot concur in the view taken by the circuit judge, that the action was prematurely brought, and for that reason only the complaint should be dismissed. For if, as we have seen, the life estate was given to Mrs. Hunter burdened with a trust for the support of herself and the children; and if, as we have seen, she has violated such trust by selling the land without lawful authority, then it seems clear that the plaintiffs, who are the children of the testator, have now a status in court to assert and preserve such rights as they may be found to have in the premises.

This leads us to the fourth and last inquiry in the case—the question of subrogation. In the outset, the appellants raise the point that as no such question was raised by the pleadings, it cannot be raised now. While, under the judgment which we propose to render in this case, this point becomes immaterial, yet we may say that while the word “subrogation” does not appear to have been used in the answer, yet the essential facts out of which the ³⁹³ right of subrogation arises, to wit, that the lands were sold by the executrix under a supposed authority so to do, and the proceeds of such sale were applied to the debts of the testator, and the further fact that Nannie W. Hunter was permitted to testify, without objection, that she had sold the lands and had applied the entire proceeds of such sale to the payment of the debts of the testator, might be sufficient to show that such point is not well taken. We will, therefore, proceed to consider the question of subrogation upon its merits. In 24 American and English Encyclopedia of Law, first edition, at page 258, where the writer is discussing the doctrine of subrogation, we find, as an illustration of one of the instances in which the right of subrogation arises, the following language: “So where an executor sells real estate, and uses the proceeds in the payment of debts, under a mistake of his powers, and the purchaser is ousted by the devisee, the

land, in equity, will be subjected to indemnify the purchaser to the extent to which his money was applied to the debts over and above the personal estate": See, also, 3 Pomeroy's Equity Jurisprudence, sec. 1300. But we need not go beyond the limits of our own state for authority upon this point. In *Cathcart v. Sugenhimer*, 18 S. C. 123, the property of a lunatic had been sold under an order of the court of common pleas, made in a proceeding instituted by the committee of the lunatic, to which the lunatic was not made a party. Subsequently, the commission of lunacy was superseded, and *Cathcart*, the person who had been declared a lunatic, having thus been restored to his rights as a person *sui juris*, brought an action to recover certain property bought by the defendant *Sugenhimer*, at the sale above mentioned. One of the defenses set up was that the defendant's money having gone to pay the debts of the lunatic, she had the right to be subrogated to the rights of the creditors whose debts had thus been paid by the defendant's money. The court sustained the right of subrogation. In delivering the opinion of the court, Mr. Justice McGowan uses this language: "Wherein did this sale differ from that of the property of a decedent ³⁹⁴ for the same purpose?" and then quotes with approval the following passage from *Freeman on Void Judicial Sales*, 51: "If by a sale of the lands of a decedent his debts are paid, and it turns out that the sale is void, the purchaser has the right to be subrogated to the claims which he has by his purchase paid, and he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled." That case has been recognized and followed in the recent case of *Bailey v. Bailey*, 41 S. C. 337, 44 Am. St. Rep. 713, 19 S. E. 669, 728. But inasmuch as the question of the defendant's right of subrogation was not, in terms, made in the pleadings, and was not considered or decided by the circuit judge, it seems to us proper to pursue the course which was adopted in the case of *Bailey v. Bailey*, 41 S. C. 337, 44 Am. St. Rep. 713, 19 S. E. 669, 728, and remand the case to the circuit court for the purpose of enabling that court to pass upon the question of the defendant's right to subrogation, with leave to the defendants, if they shall be so advised, to amend their answer by setting up formally their right to subrogation.

The judgment of this court is, that the judgment of the circuit court be reversed, solely upon the ground of error in holding that the complaint should be dismissed, for the reason

that the action was prematurely brought, and that the case be remanded to that court for the purpose hereinabove announced.

A SALE BY AN EXECUTOR WITHOUT AN ORDER of court under a will containing no power to him to so sell, is void: *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232, 24 Pac. 790.

A PURCHASER AT AN INVALID SALE OF A DECEDENT'S land for the payment of debts is entitled to be subrogated, to the extent that the money paid by him was applied to the payment of such debts, to the rights of the creditors of the decedent, and to have the amount due him charged upon the land: *Perry v. Adams*, 98 N. C. 167, 2 Am. St. Rep. 326, and note, 3 S. E. 729.

ACTS OF TRUSTEES IN CONTRAVENTION of their trusts and the binding effect thereof upon their beneficiaries, are treated in the monographic note to *Day v. Brenton*, 63 Am. St. Rep. 467-477.

PEOPLE'S BANK v. BRAMLETT.

[58 S. C. 477, 36 S. E. 912.]

JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID. If land is sold at judicial sale by metes and bounds, and it subsequently appears that a portion of the land within such boundary is held by title paramount, a survey to ascertain that the bidder has not received the number of acres sold is not necessary to entitle him to an abatement of his bid.

JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID. A purchaser of land at judicial sale by metes and bounds is entitled to an abatement of his bid to cover a deficiency of land within such boundary held by title paramount.

JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID—ESTOPPEL.—A purchaser of land at judicial sale by metes and bounds is not estopped, by constructive notice of a judgment affecting the property sold, from seeking before compliance with his bid an abatement thereof for a deficiency in acreage, discovered after the sale and held by title paramount.

JUDICIAL SALES.—RULE OF CAVEAT EMPTOR does not apply to executory sales of real estate by a court of equity.

JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID. A purchaser of land sold by metes and bounds at judicial sale, before completing his contract, may seek an abatement of his bid for a deficiency in acreage, if he has done nothing creating an estoppel.

JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID—EXECUTED CONTRACT.—Misrepresentation and deficiency of acreage are sufficient grounds for the abatement of a bid at a judicial sale of land sold by metes and bounds, even after the contract is executed, if no element of waiver or estoppel intervenes to prevent.

L. K. Clyde and W. H. Irvine, for the appellant.

L. O. Patterson, for the appellee.

478 JONES, J. This appeal is from a decree of the circuit court allowing a purchaser at a foreclosure sale of land an abatement in the price, on account of a defect in the title to a part of the land sold. The case is thus stated in the circuit decree: "This case comes before me upon the master's report, which shows that H. J. Haynsworth had purchased one of the tracts of land ordered to be sold at the price of two thousand five hundred dollars, but that after his bid he ascertained that a certain portion of the land had been recovered from the mortgagor by title paramount, in the case of *Spillors v. 479* Bramlett, and he claimed an abatement of one hundred and fifty dollars from the price, because of the failure of the title to said portion. The affidavit of Mr. Haynsworth shows that he did not know that a good title to said portion of the land would not be conveyed by the master's deed, and that the lands were worth about fifteen dollars per acre. The record in the case of *Spillors v. Bramlett* shows a recovery of a portion of this Jenkins tract, said to contain about twelve acres. The decree of foreclosure and the advertisement under which the land was sold describe it as the Jenkins tract, and state specifically the lines, metes, and bounds, and describe it as containing one hundred and sixty-six acres, more or less. The portion recovered by *Spillors* is included within these lines. On learning the situation Mr. Haynsworth deposited in the hands of the master enough money to cover the cash portion of the bid, making due allowance for the above deficiency; this was not made as a payment upon his bid, but was a mere deposit to await the determination of the court upon the matter. I find from the evidence before me that the abatement applied for, to wit, one hundred and fifty dollars, is reasonable and should be allowed, unless there is some rule of law forbidding it.

"The land was sold at a full price, and it seems just that the purchaser should not be required to pay for a portion which he cannot get. The application for abatement is resisted by the attorneys of one of the mortgagees, Mrs. Townes. She claims that the purchaser at a sale under a decree of foreclosure is not entitled to any relief where there is a deficiency, or a failure of title as to a portion of the property. This position may be correct after the contract has been executed and the deed of conveyance made, and the authorities cited by the attorneys for the mortgagees tend to support such contention. But there is quite a difference where the contract is executory. The general doctrine is, that one who agrees to purchase land

will be allowed a reasonable opportunity to investigate the title, and if he finds that the title fails as to a portion, or there is defect in the title, he will be allowed to rescind the trade or an abatement from the purchase ⁴⁸⁰ price. After the contract has been executed, however, and the deed actually made, the purchaser must look to the warranty contained in his deed, and he is entitled to only such remedy as he has under that warranty. The present case is one where the contract is wholly executory, and I think the general rule applies to this case, and entitles the purchaser to an abatement of the price."

1. The first exception imputes error in allowing the abatement, when there was no evidence offered to prove such deficiency, or to show that the purchaser would not under the master's deed get one hundred and sixty-six acres as claimed by him, there having been no survey made of the land. The affidavit of the purchaser was before the court, which stated "that a part of this land was recovered by A. Spillors about 1890, thus taking a part of the land included within the lines, metes, and bounds by which it was sold to deponent, and deponent has been unable to get possession of said portion, although it is included within said metes and bounds." The master reported that the purchaser, Haynsworth, claims a reduction upon his bid of one hundred and fifty dollars, for the reason that it appears from the record of the case of Spillors v. Bramlett that a portion of the tract bid off by him, containing about twelve acres, was recovered by plaintiff in that action by title paramount prior to the institution of this suit of foreclosure. The circuit court found that "the record in the case of Spillors v. Bramlett shows a recovery of a portion of this Jenkins tract, said to contain about twelve acres." It is stated in the argument of appellant that the record in the case of Spillors v. Bramlett was not put in evidence, and no evidence was offered at the hearing of the master's report, except the affidavit of respondent. But the findings by the circuit court as to what the record in Spillors v. Bramlett shows, is not specifically excepted to, and we cannot assume that such finding was without evidence. The fact of a deficiency by reason of the recovery in Spillors v. Bramlett, was shown by respondent's affidavit, which was not in any way disputed, and appellant made no effort whatever to show that ⁴⁸¹ it was less than claimed by respondent. We are satisfied appellant has not been prejudiced in this matter. It was not at all necessary to have a survey to ascertain whether respondent might not acquire one

hundred and sixty-six acres by his purchase, notwithstanding said deficiency. The respondent bid for a tract described by designated boundaries; the deficiency arose from a failure of title to a portion within those boundaries; and the court has found that an abatement to the extent of one hundred and fifty dollars on the purchase price of two thousand five hundred dollars would be reasonable, to which there is no specific exception.

2. The second exception assigns that it was error to allow such abatement when said tract was sold as a body, for a sum in gross, the number of acres stated in the advertisement being used as a part of the description of the property, as evidenced by the advertisement and the use of the expression "more or less." The tract involved was described in the mortgage, complaint, decree, and advertisement for sale as follows: "The Jenkins tract, containing one hundred and sixty-six acres, more or less, conveyed to W. A. Bramlett by O. H. Jenkins, November 4, 1876, recorded in R. M. C. office book 2, page 223, described as follows (giving a minute description by courses and distances and corners); adjoining lands of Goghill, Hide, and others." It is true that the tract was sold as a body for a sum in gross, but it will be observed that the deficiency in question is not a mere deficiency in quantity arising from a mistake or variation in calculation of the acreage contained in specified boundaries, but the deficiency arises from failure of title to a part of the land within the given boundaries. If the deficiency was merely due to an error or variation in a surveyor's calculation, and the purchaser could nevertheless take the land within the specified boundaries, such deficiency, being only six per cent of the acreage mentioned, would be guarded against by the words "more or less" in the description, and would not be such a gross variation as would call for redress, as shown in such cases as *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 629, and *Erskine v. Wilson*, 41 S. C. 198, 19 S. E. 489. But in this case the purchaser cannot ⁴⁸² get the land specifically defined by metes and bounds and corners, since a portion of it is not in the power of the court to convey, it having been taken from the mortgagor by title paramount. The purchaser bought the "Jenkins tract," whatever its acreage, but cannot receive a title for the whole of said tract.

3. "It is excepted that the purchaser is estopped to claim abatement, because with knowledge of said deficiency he paid a part of the purchase money, went into possession of the property and rented the same for the year 1899." This ex-

ception has no basis in the facts as shown by the record before us, by which we must be governed alone. There is no evidence whatever that the purchaser went into possession and rented the land, and the record distinctly shows that the purchaser refused to comply with the terms of sale unless an abatement of one hundred and fifty dollars was allowed.

4. It is contended that the purchaser ought to be denied any relief because he had constructive notice of the judgment recovered in the case of *Spillors v. Bramlett*, recorded in Greenville county prior to the execution of the mortgage. The purchaser swears positively that he had no knowledge of the deficiency at the time of purchase or bid. Whether a purchaser at an equity sale shall be held bound by constructive notice of all recorded judgments affecting the property sold, so as to defeat relief for defect of title actually discovered after the sale and before compliance, will depend upon whether it is the policy of the court of equity in this state to allow purchasers at sales under its order a reasonable time to examine into the title before compelling compliance. In *Mitchell v. Pinckney*, 13 S. C. 212, it was stated: "Reasonable time is always given for the examination of titles, and, if necessary, a reference will be ordered." We take it that this expresses the policy in this state, and it is a fair and just one to all concerned, and is well calculated to inspire confidence and promote competition at equity sales. Such being the rule, we do not well see how purchasers at equity sales should be denied relief for ⁴⁸³ defect of title, on the mere ground that they are bound by constructive notice of such defect, unless it be that relief is never to be afforded for defect of title which a full examination of the records would disclose, which would for most practical purposes be a denial of relief for defective title. If one has actual notice of the defect in the title, or has before his bid discovered such defect by an examination of the records, there would be good grounds for denying him any relief; but if he has no actual notice, and bids in reliance on the rule allowing him a reasonable time to examine into the title, he ought not to be denied relief, merely because he had constructive notice of the records at the time of his bid. Then, from the facts before us, we cannot affirm with certainty that the record in *Spillors v. Bramlett* would disclose in itself the fact of the deficiency claimed; for it may be that some evidence aliunde was necessary to identify the land recovered in that case as a portion of the tract sold. This evidence was furnished the circuit court by the affidavit of the

purchaser, who, after showing the identity, swore that he did not know of the deficiency at the time of his bid.

5. The fifth exception imputes error in holding that said purchaser had a right to time in which to investigate title after sale, when the decree under which these lands were sold directed the master to resell at the risk of purchaser if he failed to comply within an hour after his bid. We do not think such direction in the decree affects the question. As a matter of fact, the master did not resell, and no questions are before us growing out of a resale at the risk of a purchaser. The master has seen fit to report the matter to the court for guidance, instead of attempting to resell, and the court by its decree has again instructed the master in the premises. Notwithstanding the direction to resell on noncompliance, it was competent for the court in these proceedings to direct acceptance of the purchaser's bid, less the abatement allowed.

6. The remaining question is covered by the eighth exception, which assigns error in allowing said abatement, or any ⁴⁹⁴ abatement of the purchase price of land sold at a forced judicial sale for the collection of money, in which there are no implied warranties, and to which the doctrine of caveat emptor applies, in the absence of fraud or misrepresentation. In execution sales by the sheriff, the maxim of caveat emptor is rigorously applied. A sheriff under an execution is not directed to sell specifically described property, is governed by general laws, and is not the agent of the court in such sale. The court does not confirm his sales and exercises no supervision over them, as it does with reference to sales under its own order. A sheriff selling under an execution cannot be said to represent in any way the defendant in execution, except in so far as by general law he is made the organ by which the interest of the defendant in execution in property sold is conveyed to the purchaser. Hence it has been long settled that a purchaser at an execution sale by a sheriff buys at his peril, in the absence of fraud or misrepresentation. This, in a large degree, accounts for the sacrifices often attending execution sales, for it is reasonable to suppose that a prudent purchaser will make allowance in his bid for the contingencies of his purchase. In some jurisdictions this stern maxim of the common law is applied to all judicial sales at law or in equity, but in this state a more liberal and reasonable rule prevails. In equity sales the court is the vendor. Its order of sale acts on specifically described property. Purchasers are invited by the court to bid,

and it is well known that bidders at such sales feel a greater sense of security that they will get the described property, or be treated with equity. This tends to make property bring its value, a thing to be desired and encouraged. Now if one who seeks equity must do equity, ought not a court of equity, becoming a vendor of property at the instance and for the benefit of the parties concerned, do equity and render appropriate relief to a purchaser, when the court finds itself unable to convey what it advertised to sell? Surely the court will not do less than it would compel any other vendor to do in the case of a private sale. The principle ⁴⁸⁵ is well established that at partition sales relief will be extended to a purchaser for defect of title. The purchaser at such sales will not be compelled to perform his contract to purchase, if his title is doubtful: *Fuller v. Missroom*, 35 S. C. 326, 14 S. E. 714; *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 403. In the case of *Monaghan v. Small*, 6 S. C. 177, this principle was applied to a sale under proceedings to sell lands of a decedent, in order to apply the proceeds to the payment of his debts and for distribution. I see no good reason why a rule applicable to partition sales, and sales for the payment of the debts of a decedent, is not also applicable to a sale under foreclosure of a mortgage. In all such sales the court is vendor at the instance and for the benefit of the parties in the enforcement of a right. In the case of *Bolivar v. Zeigler*, 9 S. C. 287, the court made a broad path for equity in these words: "Whatever doubts may have been once entertained as to whether the doctrine of caveat emptor applied to sales made by the commissioner in equity, those doubts were finally settled by the principles established by the case of *Commissioner v. Smith*, 9 Rich. 515, and there can be now no doubt that this maxim does not apply to such sales, and, therefore, that the defense here set up, if established on the trial, will be a sufficient defense to the action. For although the sale in this case was made by the sheriff, yet it was not a compulsory sale under process of execution, where the rule of caveat emptor does apply, but a sale for partition, at the instance of the parties, and must be governed by the same principles as applied to such sales when made by the commissioner in equity." That able and learned annotator, Mr. A. C. Freeman, in a note to *Burns v. Hamilton*, 70 Am. Dec. 575, and fortifying the statement by numerous citations, says: "It is held in some states that the rule of caveat emptor applies to mortgage, partition, and other equity sales, . . . and that,

in the absence of fraud or warranty, a failure of title to the property sold is no ground for the relief of the purchaser. But the better rule is that in equity sales the purchaser is entitled to receive a title free from ⁴⁸⁶ equities and encumbrances of which he had no notice; and if by the sale he will not receive such a title, he will not, upon his making objection, be compelled to complete his purchase, but will be released therefrom, unless the title can be made good, or other just relief awarded." The case of *Latimer v. Wharton*, 41 S. C. 508, 44 Am. St. Rep. 739, 19 S. E. 855, contains some language from which it might be inferred that the court regarded the rule of caveat emptor applicable to an executed sale under foreclosure for debt, on the grounds that such a sale was compulsory, and so would come under the rule applicable to execution sales by the sheriff. But the point decided in that case was, that if the purchaser of land, sold at a judicial sale for the purpose of paying debts of a testator, gives a bond and mortgage for the purchase money; if, upon default in payment, he is sued, but fails to plead failure of consideration in defense, and judgment is obtained; and if, before payment, the land so purchased is recovered by title paramount, and execution on such judgment is levied on other property of the purchaser, an injunction will not issue to enjoin a sale under such levy, upon the complaint of the purchaser, who made no allegation of fraud or misrepresentation by which he was induced to accept the deed to the land, enter into possession thereof, or execute the bond and mortgage to secure the credit part of the purchase money. That case was very different from this case, where the contract is executory, and where no element of waiver or estoppel enters. In that case, the court recognized a great difference between enforcing an executory contract and giving relief after it has been executed, referring to the several cases where the distinction was recognized, viz.: *Evans v. Dendy*, 2 Spear, 9, 42 Am. Dec. 356; *Fuller v. Fowler*, 1 Bail. 75; *Prescott v. Holmes*, 7 Rich. Eq. 1. See, also, *Parker v. Partlow*, 12 Rich. 683. So that even if the rule of caveat emptor should apply at all to sales by the court of equity, it should only apply after the sale is executed. The contract of a bidder at a sale in equity is not executed until he has complied with the terms of sale and received the officer's deed of conveyance, or done something ⁴⁸⁷ which should estop him from asserting that the contract was not executed. If a purchaser at a sale in equity, after discovery of the defect in title, complies with his bid and goes into possession of the land, it

might with force be contended that such purchaser is estopped to assert such defect afterward; but no such case is presented here. The contract of the purchaser in this case is executory merely. But further, we think it may be said in this case that there was a misrepresentation as to the property sold, for which cause relief would be granted, even after an executed contract, if no element of waiver or estoppel interposed to prevent. It is not essential that such misrepresentation be intentional. It appears that the land was conveyed to the mortgagor in 1876. In 1888 a portion of the land was recovered from the mortgagor by title paramount, in the case of *Spillors v. Bramlett*. After this the mortgagor, with knowledge of this recovery, but probably not thinking of it at the time, executed the mortgage on land a part of which he did not own. This misrepresentation, so incorporated in the description of the mortgage, went likewise into the complaint, decree, and advertisement, which followed the description in the mortgage. This minute description in the mortgage and advertisement already referred to in this opinion, giving courses, distances, and corners, was as if a plat of the land had been made by a surveyor and exhibited at the sale as a plat of the land sold. The case of *Tunno v. Fludd*, 1 McCord, 122, which also decides that the rule of caveat emptor does not apply to sales by the master in chancery, for he being the agent of the parties for whose benefit the sale was made, they are as much bound by his representations as they would have been by their own, further decides that where a tract of land has been sold by the master in equity, and represented upon a map as containing more acres than it was discovered upon a resurvey to have, an abatement will be allowed for the deficiency in the quantity according to the nature and extent of the defect. To the same effect is *Barkley v. Barkley*, Harp. 284.

⁴⁸⁸ The judgment of the circuit court is affirmed.

Pope, J., concurs on the ground of a misrepresentation as to the land sold.

Gary, J., concurs in the result.

JUDICIAL SALES.—THE RULE OF CAVEAT EMPTOR applies to purchasers of real estate at a judicial sale: *Pope v. Benster*, 42 Neb. 304, 47 Am. St. Rep. 703, 60 N. W. 561; *Gonce v. McCoy*, 101 Tenn. 587, 70 Am. St. Rep. 714, 49 S. W. 754. The purchaser cannot object that he obtained less land than he supposed he was buying: See the monographic note to *Burns v. Hamilton*, 70 Am. Dec. 574. Though the doctrine of caveat emptor applies where the

sale and purchase are complete, yet if the buyer discovers the defect before he pays his money, he cannot be compelled to complete: See the note to *Neal v. Gillaspie*, 26 Am. Rep. 39. And where a particular interest is decreed to be sold, as that of a mortgagor, he may be petitioned to be released from his purchase if, for any reason, this interest does not pass: See the monographic note to *Burns v. Hamilton*, 70 Am. Dec. 575.

HALL v. BOATWRIGHT.

[58 S. C. 544, 36 S. E. 1001.]

BETTERMENTS—ESSENTIALS TO RECOVERY.—Under the South Carolina betterments act, Revised Statutes, chapter 64, article 4, it is incumbent on the plaintiff who has been ousted from possession to show, in order to recover, not merely the value of his improvements, but he must also present evidence from which the jury can find a special verdict, stating the value of the land with the improvements, and its value without them. And evidence tending to show that improvements of some considerable value have been put on the land does not warrant sending the case to the jury nor save a nonsuit.

BETTERMENT LAWS recognize the existence of an equitable right and give a remedy for its enforcement where none existed before.

COTENANCY—RIGHT TO INVOKE BETTERMENT LAWS. Since betterment laws are intended to give a remedy where none existed before, their provisions cannot be invoked by, and they do not apply to, a cotenant who, believing himself the sole owner, has made improvements upon the common property, as he has ample relief by being allotted, on partition, the portion improved by him, or in case of sale, by having allotted to him the increased purchase price by reason of the improvement. Betterment statutes do not give cumulative remedies to cotenants.

COTENANCY—BETTERMENTS.—After judgment against a cotenant in partition, he cannot invoke the provisions of a betterment statute to the effect that after final judgment in favor of plaintiff in "an action to recover lands and tenements" the defendant, in certain cases, is entitled to maintain an action to recover for improvements put upon the land. An action for partition is not an action to recover lands in the sense of such statute.

Sawyer & Owens and G. W. Croft & Son, for the appellants.

Henderson & Henderson, for the appellee.

545 JONES, J. This is an action under the betterment act, and the appeal is from an order of nonsuit. The documentary evidence introduced showed that Erwin J. Boatwright died intestate, seised of a tract of land in Aiken county, leaving as his only heirs at law his widow, Olivia Boatwright, and the defendants, his children. That after **546** the death of Boat-

wright, this land was assigned to said widow and children as a homestead. That said land, assessed in the name of Olivia Boatwright, was sold for taxes, and the plaintiff became purchaser, took sheriff's title, dated October 7, 1895, and immediately entered into possession of the land, enjoying the rents and profits. In May, 1889, the defendants brought action for partition of said land against Hall, alleging substantially the foregoing facts, and also that Hall had acquired by purchase at a tax sale the one-third interest of Olivia Boatwright in said land. Hall, in his answer to said suit, did not deny any of the facts alleged in the complaint. He contented himself with denying "that the plaintiffs have title to the land described or any part thereof, or that they are entitled to the relief demanded"; alleging also that "he has legal title to the premises"; and as a third defense alleging that he had purchased said land at a tax sale more than two years before the commencement of the action. As if this raised an issue of title paramount, the matter was submitted to a jury, which rendered a verdict in favor of plaintiffs "for a two-thirds undivided interest in the land in dispute." Thereupon a decree was rendered for a sale of the land for partition, allotting to said Hall one-third of the proceeds. Within forty-eight hours after such judgment, plaintiff brought this action for betterments. In addition to the foregoing, it appears in the original "case" that plaintiff introduced oral testimony "tending to show that improvements of some considerable value had been put by him on the land described in the complaint." At the hearing the "case" was amended by consent, so as to state that the plaintiff also introduced testimony that at the time of the purchase he believed his title good in fee.

The reasons given for the nonsuit by the circuit court may be briefly stated thus: that the betterment act contemplated a recovery of the land in toto and not a mere interest therein; that the object of the act was to supply a remedy for one who was ejected in a suit at law, and that a cotenant ⁵⁴⁷ who makes improvements has a complete remedy in equity. We think there was no error in granting the nonsuit.

By his first exception, appellant imputes error in holding that he could not recover the value of his improvements placed upon the land in a separate action. Under the betterment act, it is incumbent on the plaintiff to show, not merely the value of his improvements, but he must present evidence from which the jury could find a special verdict, stating the value of the

land without the improvements, and the value of the land with the improvements, the value of the improvements being the sum which the land should be found at the rendition of the judgment to be worth more in consequence of the improvements than it would have been worth had no improvements been made. Evidence merely tending to show that improvements of some considerable value had been put on the land would not warrant sending the case to the jury. On this ground the nonsuit is sustainable, although it was not placed upon such ground.

But further, the betterment act was not intended to furnish a remedy for a tenant in common who made improvements on the common property. By common law, the owner of the fee is the owner of all the structures and improvements on the land; therefore, one making improvements upon the land of another would lose his improvements on recovery of the land from him by the true owner, and he was without remedy. The betterment act was intended to relieve this condition and give a remedy. As stated by Mr. Justice Gary, in *Tumbleston v. Rump*, 43 S. C. 379, 21 S. E. 305: "The statutes in regard to betterments were . . . for the purpose of softening the asperities of the law and affording relief where none otherwise existed." And Judge Cooley, in *Constitutional Limitations*, fifth edition, 480, says: "Betterment laws recognize the existence of an equitable right, and give a remedy for its enforcement where none existed before." At the time of the enactment of this statute in 1870, there was and there is now ample remedy for a cotenant, who ⁵⁴⁸ believing himself sole owner, has made improvements on the common property, and there was no necessity to pass such a statute in his behalf. The cases of *Williman v. Holmes*, 4 Rich. Eq. 476, *Scaife v. Thompson*, 15 S. C. 337, *Buck v. Martin*, 21 S. C. 591, 53 Am. Rep. 702, *Johnson v. Pelot*, 24 S. C. 264, and other cases that might be cited, show that the court of equity can and will give relief to a cotenant who, under the belief that he has exclusive title in fee, makes improvements on the property, either by allotting to him on partition the portion of the premises improved by him, or in case of a sale by allotting him the increased purchase price by reason of such improvements. If the betterment act was to give a remedy where none existed, it could not have been intended to give a cumulative remedy to a cotenant. He does not improve another's land; he improves his own land—that is to say, land in every inch of which he has an individual interest. Even if the improved portion is not allotted to him, and if no

provision for compensation is made in case of a sale, still he secures in the division of the purchase price a portion of the value imparted by his improvements. The case of *McGhee v. Hall*, 28 S. C. 562, 6 S. E. 566, appears to be in point. In that case it was held that where a cotenant, supposing himself to be the exclusive owner, has added to the value of the common property by improvements, and is liable for rents and profit thereof, his account for rents should be credited with the increased value imparted by the improvements, and that the remedy under the betterment act was not applicable. There is another reason why the said act does not apply in this case. The statute provides: "After final judgment in favor of the plaintiff in an action to recover lands and tenements, if the defendant . . . purchased the lands and tenements recovered in such action . . . supposing at the time of such purchase such title to be good in fee . . . the defendant shall be entitled to recover of the plaintiff in such action, etc." Whether lands were recovered of the plaintiff herein, in an action of ejectment, must be determined by the complaint in the case. ⁵⁴⁹ In the case of *Elmore v. Davis*, 49 S. C. 2, 26 S. E. 898, this court, construing section 98, subdivision 2, of the code, providing that "the plaintiff in all actions for the recovery of real property, etc., is hereby limited to two actions, etc.," held that an action for partition in which the issue of the title was raised in the answer, was not an action to recover real estate in the sense of that statute, and in determining the question the court was controlled by the allegations in the complaint. So in the proceedings in question, if we are to be controlled by the allegations of the complaint, the case of the Boatwrights against Hall was not an action to recover real estate, but was a case for partition strictly. If we could be justified in resorting to the answer to determine whether an action strictly and solely for partition was converted into an action in ejectment also, there is nothing in the answer to show title paramount in defense to the right of partition, since all the facts upon which the right to partition rested stood admitted by the pleadings. Appellant, in support of his contention that said partition proceeding was an action to recover land, and so within the betterment act, cites the following language in *Ream v. Spann*, 28 S. C. 533, 6 S. E. 325: "It seems to us that the case embraced two causes of action—one purely legal for the recovery of the land from the Reams, and the other equitable, for partition after the land was recovered. The legal title should have, therefore, been first

tried by a jury; and if that resulted in favor of the plaintiff, then, and not till then, could the court decree partition—as in *Adicks v. Lowry*, 12 S. C. 97. In the trial of the legal issue, the action being for the recovery of specific real property, the question of title should have been submitted to a jury upon the issues made by the pleadings. . . . So far as the McReas are concerned, this is simply an action for the recovery of a tract of land.” But it must be noted that the McReas were not made defendants as cotenants, but as strangers in possession, claiming adversely. The allegations of the complaint were such that the court was induced to say: “This was an action to recover real estate, and incidentally thereto to partition ⁵⁵⁰ the same.” Under such circumstances, the court might be justified in saying that the action was to recover real estate, so far as those parties were concerned, who were not cotenants with plaintiffs, but were in possession claiming by an independent and paramount title. The language above quoted from *Ream v. Spann*, 28 S. C. 533, 6 S. E. 325, was quoted with approval in subsequent cases, as in *Carrigan v. Evans*, 31 S. C. 266, 9 S. E. 852, and in *Sumner v. Harrison*, 54 S. C. 359, 32 S. E. 572, but in these cases, as in *Ream v. Spann*, 28 S. C. 533, 6 S. E. 325, the complaint tendered an issue of title as to those defendants who were not concerned with the plaintiffs as cotenants, but were strangers in possession, and alleged in the complaint to claim some interest therein. In the action in question, the complaint showed that the defendant therein was a tenant in common with the plaintiffs in the premises sought to be partitioned, and did not allege any ouster: *Elmore v. Davis*, 49 S. C. 2, 26 S. E. 898. The decisions also show that when it is sought to carry this supposed theory that an issue of title raised in the answer in a strict action for partition makes two independent causes of action, one in law for the recovery of real estate and the other in equity for partition, to its logical consequences, the theory is repudiated. For example, a nonsuit of the legal issue of title raised in an equitable action will not be permitted: *Woolfolk v. Graniteville Co.*, 22 S. C. 332; *McClenaghan v. McEachern*, 47 S. C. 451, 25 S. E. 296; and the prevailing party in the issue of title does not, as a matter of right, become entitled to the costs, as in a legal action in ejectment: *McCarter v. Caldwell*, 58 S. C. 65, 36 S. E. 507. Our conclusion is that no recovery of land in an action of ejectment has been had against the plaintiff, and, therefore, he is not within the betterment act.

The judgment of the circuit court is affirmed.

THE TERM "BETTERMENTS" HAS NO APPLICATION TO COTENANTS, but is for the protection of a purchaser of land who makes lasting improvements under the belief that he has a good title: *Holt v. Couch*, 125 N. C. 456, 74 Am. St. Rep. 648, 34 S. E. 703. However, a cotenant who believes himself to be the owner of the entire premises, and in good faith places improvements thereon, is entitled, on partition, to be allotted that portion upon which the improvements are placed; and if such division cannot be made, the property should be sold and the value of the improvements awarded him out of the proceeds: *Leake v. Hayes*, 12 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48. See, further, the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 938-941.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

CUSTER COUNTY v. TUNLEY.

[13 S. Dak. 7, 82 N. W. 84.]

OFFICIAL BONDS—RIGHT OF SURETIES TO QUESTION AUTHORITY OF THEIR PRINCIPAL TO RECEIVE MONEYS.—

If a county treasurer receives partial payments of personal property taxes, giving his receipt as treasurer therefor, his sureties cannot escape liability on the ground that he was not authorized to receive such payments, and did not charge himself therewith in the regular accounts of his office. The claim that he holds such money merely in trust for the persons paying it is not sustainable.

OFFICIAL BONDS—SURETIES FOR SECOND TERM.—The sureties on an official bond of an officer are answerable for moneys received by him in the preceding term, if, during the term for which they are sureties, he reported such moneys to the county commissioner and charged himself therewith. It will be presumed that he then paid them over to himself as his own successor.

OFFICIAL BONDS—SURETIES—WHAT IS NOT AN ACCOUNT STATED OR AN AGREEMENT BETWEEN THEM AND THE COUNTY.—An agreement between a county and the sureties of the treasurer thereof that certain actions shall be brought by the county, and that nothing contained in the agreement shall affect the liability of the sureties for the payment of about seven hundred dollars, claimed to be due from their principal for partial payment of taxes, does not amount to an account stated, nor preclude the county from obtaining judgment for a greater sum, if found to be due.

PRACTICE.—THE FINDINGS OF A REFEREE OR OF A COURT will not be disturbed by the appellate court unless they are clearly against the preponderance of the evidence.

OFFICIAL BOND—LIABILITY OF THE SURETIES FOR THE SECOND TERM.—Where a county treasurer holds office for two terms, the sureties for the second term are not answerable for moneys collected during the first and not accounted for by him nor charged to himself during the second term.

OFFICIAL BOND—ESTOPPEL AGAINST PRINCIPAL AND SURETIES.—Where a county treasurer in his report to the county commissioners states that he has received a sum of money

from his predecessor in office, and charges himself therewith, both he and the sureties on his official bond are estopped from showing that he did not receive such sum.

OFFICIAL BONDS—SURETIES, WHEN NOT ENTITLED TO CREDIT FOR OLD PAYMENTS.—If a county treasurer makes overpayments to a city and to certain school districts, from which the county derives no benefit, neither he nor his sureties are entitled to a credit therefor as against the county.

Action on the official bond of the county treasurer against the principal and sureties. Judgment in favor of the plaintiff for part of the sum claimed. Both parties appealed.

W. E. Benedict, for the plaintiff.

Charles W. Brown, for the defendants.

11 CORSON, J. This is an action against Benjamin M. Tunley, formerly treasurer of Custer county, South Dakota, and the sureties upon his official bond. The judgment was in favor of the plaintiff for the sum of \$659.71, and from this judgment both parties appeal.

In 1890 the defendant Tunley was elected county treasurer of the plaintiff county, and was re-elected in 1892, holding the office from January, 1891, to January, 1895. The sureties who are defendants in this action were sureties upon his official bond for the second term, commencing January 3, 1893. At the time the sureties executed the bond in question, the said Tunley had in his hands as county treasurer, as shown by the books in his office and the auditor's office, the sum of \$21,009.69.

On the trial there was evidence tending to prove, and the referee so found, that during his first term he had received \$1,090.70 (which was reduced by order of the court to \$631) which was not charged to the treasurer on the records of his office, nor on the records of the auditor's office. These sums, it appears, were received by the treasurer as partial payments from various taxpayers on account of their personal property taxes, and for which receipts were given by the treasurer as such, but not the usual official tax receipts. It further appears that during his second term of office he received in like manner \$757.57. These amounts the treasurer had not charged himself with in the official records of his own office, and he was not charged with these sums, or any portion of them, by **12** the county auditor. It was further found that the treasurer had accounted, in his various settlements during his two terms of office, for \$200.12 as received by him from the former treasurer, which in fact he never had received. It further

appears that in paying out moneys for the county he made overpayments to the amount of \$116.70 for which he was credited by the referee. It further appears that at the expiration of the term of Tunley's office he had in the Bank of Hermosa and the Bank of Hot Springs about \$2,600, which said banks claimed to hold for amounts due them from said Tunley. The sureties, being desirous that actions should be commenced against these banks to recover the amounts claimed to be due from them to the county, entered into an agreement with the county by which it was stipulated that the county should bring these actions, without in any manner impairing its claim against them as sureties on Tunley's official bond. These actions were commenced by the county, and the amount due from the banks recovered, and paid to the county. In that agreement was the following: "It is further agreed that nothing herein contained shall affect the liability, if any, of the said parties of the second part [the sureties] for the payment of the said sum of about \$700, so claimed as aforesaid to have been received by said Tunley as partial payments on taxes, it being understood that said county may begin a suit against said parties of the second part to recover said sum of about \$700 last named." While the amount involved in this case is not large, the questions to be considered are quite important. It is claimed by the sureties: 1. That they are not liable for any of the moneys received by the treasurer as partial payments on personal property taxes, as they were never in fact paid into the county treasury ¹³ by being charged against the treasurer either in the books of his own office or in those of the county auditor. 2. That in no event are they liable for the money received by him as partial payments on personal property taxes during his first term of office, for the reason that the moneys so received, never being charged to him, were not paid over to himself as his own successor, the sureties only being liable for the amount which appeared by his own books and those of the county auditor to have been actually in the treasury at the time they executed the treasurer's bond. 3. The sureties contend that they cannot be held, in any event, for the amount received as partial payments on account of personal property taxes for an amount exceeding "about \$700," as that was the amount agreed upon in the contract entered into between them and the county. 4. The sureties claim that they should also be allowed, for errors in accounting and overpayments, the sum of \$218.35. 5. That the referee erred in not finding upon all the issues in

the case. The county, on its appeal, contends: 1. That the referee's sixth finding of fact, which finds that the treasurer received in partial payments during his first term \$1,090.70, should have been accepted and approved, and that the order of the court reducing the same to \$631 should be set aside; 2. That the seventh finding of fact of the referee, which finds a credit for overpayments in favor of the treasurer to the amount of \$316.82, and which was approved by the trial court, should be disapproved, vacated, and set aside; 3. That the sum of \$1,848.27, found by the referee to have been received by Tunley, and not lawfully paid out by him, should measure the liability of the sureties, and is the amount for which the county is entitled to judgment.

¹⁴ The first question presented on the part of the sureties is, Are they liable for the taxes received as partial payments on personal property taxes? That question, we think, should be answered in the affirmative. While it is true the statute has not, in terms, authorized the treasurer to receive partial payments of personal property taxes, yet we think, when the treasurer has received them, and given his receipts as treasurer therefor, and holds the amounts so received as county treasurer, his sureties are liable for any misappropriation of the same. The fact that Tunley has not charged himself with the several amounts so received in the regular accounts of his office, nor been charged with the same by the county auditor, will not have the effect of relieving the sureties. The contention that he received the money only in trust for the parties paying the same cannot be sustained in view of the fact that he gave receipts for the same in his official capacity as treasurer. The obligation of the bond signed by his sureties is that he shall faithfully discharge the duties of his office, and shall account for and pay over all moneys that shall come into his hands as such treasurer; and this would include moneys received by him in partial payments of personal property taxes.

The next contention on the part of the sureties is that they, being sureties upon his official bond for the second term, are not liable for the moneys received by the treasurer on account of partial payments of personal property taxes which are not included in the amount shown to be due from him to the county by his own official records and the records in the office of the county auditor at the time they executed his official bond. Ordinarily, this might be true, and, if there was nothing in this case to show that the treasurer had accounted for this money in

¹⁵ his settlements with the county subsequent to the execution of such bond, they would not be liable. But in the case at bar it affirmatively appears that on the ninth day of January, 1893, the treasurer, in a report to the board of county commissioners, shows charged against himself \$631 received on account of these taxes. Presumptively, therefore, he paid over to himself as his own successor, this amount, in connection with the amount of \$21,009, appearing to be due from him at the end of his former term, as shown by the records in his own office and in the office of the county auditor. We are of the opinion, therefore, that the circuit court properly found that the defendants were liable for the amount so admitted to be in the hands of the county treasurer subsequent to the execution of the bond by the sureties.

The sureties further contend that by virtue of the agreement entered into between themselves and the county on the eighteenth day of February, 1895, the amount for which they should be liable was fixed at "about \$700," and that the county cannot now recover an amount in excess of that sum. But we do not so construe the agreement. The object and purpose of the agreement evidently was to enable the county to bring suits against the two banks where the county treasurer had deposited certain county moneys without releasing the sureties, and was not intended as an account stated between the sureties and the county as to the amount for which they should be held liable. It would seem from the statement contained in the agreement that the sum of "about \$700" was made with reference to the amount known at that time to have been collected by the treasurer. We are of the opinion, therefore, that the county is not limited to that amount, and may collect the entire ¹⁶ amount which it may be able to show was collected by the treasurer.

It is further contended on the part of the sureties that the referee should have allowed them, as credit for errors in favor of Tunley, the sum of \$218.35. The findings of a referee or of a court will not be disturbed by the appellate court unless they are clearly against the preponderance of the evidence. We are not able to say in this case that there is any preponderance of the evidence against the findings of the referee as to this amount.

The last contention—that the referee did not find upon all the issues—is not tenable, for the reason that his findings seem

to be very full, and substantially cover all the grounds involved in the controversy.

It is claimed on the part of the county, in its appeal, that the court erred in reducing the finding of the referee as to the amount of partial payments on personal property taxes received during the treasurer's first term of office from \$1,090.70 to \$631. But, as we have before indicated, the \$631 was the only amount which the treasurer accounted for in his settlements with the county after entering upon his second term, and we are of the opinion that the court below properly held that the sureties upon his official bond for the second term could not be held for a sum exceeding the amount so accounted for by the treasurer.

It is further contended on the part of the county that the referee erred in giving the sureties credit for \$200.12, which they claimed was never in fact received by Tunley from his predecessor. We are of the opinion that the county is right in its contention. It clearly appears from the evidence that Tunley, in his reports to the board during the four years he held the ¹⁷ office of treasurer, reported this sum as paid, or, in other words, charged himself with the full amount due from his predecessor, as shown by the books of his office and in the office of the county auditor; and certainly he would be estopped from now showing that he did not receive the full amount so due. The same rule, we think, applies to the sureties upon his official bond. It was his duty to keep correct books of account, and make true reports to the board, and for the faithful performance of these duties the sureties were bound. This question was very fully considered by the supreme court of Illinois, in 1893, in the case of *Doll v. People*, 145 Ill. 253, 34 N. E. 413. In that case the sureties sought to show that the treasurer of Clark county had never in fact received from his predecessor \$7,000, which the treasurer had charged himself with, and which he had included in his four annual reports to the board of county commissioners. On the trial of that case these reports, together with the action of the county upon them, and the books containing a record of the transactions of the treasurer during his term of office, which he had turned over to his successor, were all read in evidence on the part of the county. For the purpose of overcoming the force and effect of this evidence, the sureties called certain witnesses, and undertook to impeach this record evidence, and prove that the treasurer did not in fact receive the money from his predecessor, as he had reported; that the reports were false, and that his predecessor

was the defaulter. But the trial court held that the reports of the treasurer and his official record could not be impeached or contradicted, and the supreme court, after discussing the question at length, affirmed the decision of the court below: *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Morley v. Matamora*, 18 78 Ill. 394; *Roper v. Trustees*, 91 Ill. 518, 33 Am. Rep. 60; *Longan v. Taylor*, 130 Ill. 412, 22 N. E. 745. We are of the opinion, therefore, that the referee erred in finding and crediting these sureties with the said amount of \$200.12, and for this error the judgment of the court below must be reversed, and a new trial granted.

Another question that may arise upon a new trial of this case, and that may now properly be decided, is, Were the sureties entitled to be credited with the sum of \$116, claimed to have been overpaid by the treasurer to Custer City and other school districts? It is not claimed that the county received any benefit from these overpayments, and we fail to see upon what principle the county could be held to sustain the loss. We are of the opinion, therefore, that the referee erred in crediting the sureties with these overpayments. The judgment of the court below is reversed, and a new trial ordered.

OFFICIAL BONDS.—DEFAULTS OF A PRIOR term are not chargeable against the sureties on an official bond for a subsequent term; if, however, the moneys collected during the first term remain in the custody of the officer when he enters upon his second term, the sureties for the latter term immediately become answerable therefor: Monographic note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 844, on the liability of sureties on successive bonds. See, too, *Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275, 19 South. 553.

OFFICIAL BONDS AND BREACHES thereof are discussed in the monographic note to *Commonwealth v. Cole*, 46 Am. Dec. 509-517.

NATIONAL LIFE INSURANCE COMPANY v. MEAD.

[13 S. Dak. 37, 82 N. W. 78.]

MUNICIPAL CORPORATIONS.—AUTHORITY TO ISSUE BONDS TO PAY PRE-EXISTING INDEBTEDNESS. or to raise moneys with which to pay it, is conferred by a statute giving a municipality power to borrow money on the credit of the corporation for corporate purposes.

MUNICIPAL BONDS — ESTOPPEL AGAINST CORPORATION.—Evidence that a municipality employed persons to dispose of its bonds, and furnished them with certificates or statements of

fact concerning its financial condition, should not be received for the purpose of estopping the municipality from showing that the bonds are in excess of the indebtedness it might incur under the constitution and statutes of the state.

MUNICIPAL BONDS—KNOWLEDGE WITH WHICH PURCHASER IS CHARGEABLE.—A purchaser of negotiable municipal bonds is held to know the constitutional and statutory restrictions, and the authority to issue them, and the valuation of the taxable property of the municipality as ascertained by its assessment.

MUNICIPAL BONDS—LIABILITY OF MUNICIPALITY.—IN CONSIDERING THE AMOUNT OF THE LIABILITY WHICH A CITY MAY INCUR, the debts of a school district cannot be included, though its territorial limits coincide with those of the city.

MUNICIPAL BONDS.—AN ESTOPPEL TO PROVE THAT THE MUNICIPAL BONDS ARE IN EXCESS OF THE AMOUNT OF INDEBTEDNESS which the municipality was allowed to incur cannot arise from any recital in the bonds or any representation or certificate made by any of the municipal officers, if it was required to keep, and did keep, regular books of account showing all the municipal indebtedness, and the amount of its taxable property also appears from public records open to the inspection of all persons.

MUNICIPAL BONDS TO DISCHARGE PRE-EXISTING OBLIGATIONS, WHETHER AN INCREASE OF INDEBTEDNESS.—The issuing of bonds, whether to be exchanged for pre-existing indebtedness, or to be sold and their proceeds applied to its satisfaction, does not constitute an increase of indebtedness within the meaning of statutory and constitutional restrictions upon the amount of indebtedness which may be created by or against a municipal corporation.

Application for a writ of mandate to compel the defendant Mead, as treasurer of the city of Pierre, to pay certain interest coupons. The application was refused, and the applicant appealed.

Horner & Stewart, for the appellant.

Dillon & Sutherland, for the respondent.

⁴¹ HANEY, J. This proceeding was instituted to compel defendant, as treasurer of the city of Pierre, to pay certain interest coupons. A trial by the court, of the issues raised by an alternative writ of mandamus and answer, resulted in a judgment of dismissal, and the plaintiff appealed. October 1, 1890, the city, for value received, executed and delivered to various parties 200 funding bonds, each for \$500, numbered consecutively ⁴² from 1 to 200, inclusive, with interest coupons attached, containing the following recitals: "This bond is one of a series of bonds, amounting to one hundred thousand dollars, issued for the purpose of funding the outstanding indebtedness of the city, in pursuance of the general incorporation laws of the state of South Dakota, approved March 6, 1890, adopted

by said city, and an ordinance of said city of Pierre entitled, 'An ordinance to issue bonds for the purpose of funding and paying the outstanding indebtedness of the city of Pierre,' approved August 5, 1890, and a vote of the electors in favor of issuing said bonds, by a majority of the legal votes cast at a special election duly held in said city on the sixteenth day of September, 1890." October 1, 1891, the city, for value received, executed and delivered to various parties 300 funding bonds, each for \$500, numbered consecutively from 1 to 300, inclusive, with interest coupons attached, containing the following recitals: "This bond is one of a series of bonds amounting to one hundred and fifty thousand dollars, issued for the purpose of funding and paying the outstanding indebtedness of the city, in pursuance of the general incorporation laws of the state of South Dakota and an ordinance of said city of Pierre entitled, 'An ordinance to issue bonds for the purpose of funding and paying the outstanding indebtedness of the city of Pierre, South Dakota,' approved July 28, 1891, and a vote of the electors in favor of issuing said bonds, by a majority of the legal votes cast at a special election duly held in said city on the eighth day of September, 1891." Plaintiff is the bona fide holder of coupons cut from bonds belonging to both issues. Collection is resisted on the ground that the city was without power to issue funding bonds, and that when⁴³ these were issued the city debt exceeded the constitutional limit. The statute referred to in the bonds gave the city council power: "To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and forms, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to any amount including existing indebtedness, in the aggregate to exceed five (5) per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after contracting the same; provided, no bonds shall be issued by the said city council under the provisions of this act either for general or special purposes unless at an election after twenty days' notice in a newspaper published in the city, stating the purpose for which said bonds are to be issued

and the amount thereof, the legal voters of said city by a majority shall be determined in favor of issuing said bonds": Laws 1890, c. 37, art. 5, sec. 1. It will be observed that this law gives express power to borrow money by issuing bonds for corporate purposes. Did this confer power to issue bonds for the purpose of funding floating indebtedness? An affirmative answer to this inquiry is supported by the following decisions: *Morris v. Taylor*, 31 Or. 62, 49 Pac. 660; *Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272; *Portland Sav. Bank v. Evansville*, 25 Fed. 389. The authorities cited by defendant's counsel do not sustain a different ⁴⁴ view. In *Brenham v. German-American Bank*, 144 U. S. 173, 12 Sup. Ct. Rep. 559, there was only express power to borrow for corporate purposes, and a majority of the court held that power to issue negotiable bonds could not be implied. So in *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 562, express power to issue bonds was wanting, and the court decided that the power did not exist by implication. Here, however, the statute expressly makes the power to issue bonds coextensive with the power to borrow money. Either may be exercised for any corporate purpose; and the payment of legal municipal debts is clearly a corporate purpose. If a city has power to borrow money by issuing bonds for the purpose of lighting its streets, it clearly has power to borrow money in the same manner to pay an indebtedness incurred for the same purpose. Had the legislature contemplated there would be no floating indebtedness under any circumstances, cities would have been authorized to borrow only for the purpose of paying outstanding bonds. We think the city was authorized to issue bonds for the purpose of funding its indebtedness.

Evidence was received upon the trial tending to prove that the person employed by the city to dispose of these bonds was furnished with certain statements of fact, or certificates, concerning its action preceding their execution, and its financial condition at that time, signed by its mayor, auditor, and attorney. This evidence was properly disregarded by the trial court in making its decision. If such statements or certificates were issued, the city would not be estopped from pleading an indebtedness in excess of the statutory or constitutional limitation, because the execution of such certificates was without ⁴⁵ the line of official duty and beyond the scope of official authority. The certificate of a public officer not authorized by law to make it has no more effect than that of a private person:

Meyer v. School Dist., 4 S. Dak. 420, 57 N. W. 68. The distinction between bonds which contain no reference to the constitution, or any statement that the constitutional requirements were observed, and those which expressly recite that its limitation of indebtedness has not been passed, has been plainly pointed out by the United States supreme court: *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654; *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. Rep. 216. The bonds in this case contain no reference to the constitution, but they do recite that they are issued "in pursuance of"—that is, in accordance with—"the general incorporation laws approved March 6, 1890," the limitations of which as to indebtedness are as broad as the limitations of the constitution. Therefore, the recitals are in legal effect equivalent to a representation on the part of the city officers that the indebtedness incurred, including that then existing, did not exceed the five per centum prescribed by both the statute and constitution: *Laws 1890, c. 37, art. 5, sec. 1*; *Const., art. 13, sec. 4*; *Buchanan v. Litchfield*, 102 U. S. 278; and it becomes proper to determine to what extent the city is estopped by such recitals, as against a purchaser in good faith and for value. The rule is well settled that a purchaser of negotiable municipal bonds is held to know the constitutional and statutory provisions and restrictions bearing on the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith, and pay value, he is entitled to be protected by the recital of any fact the existence of which the officers ⁴⁶ who executed them were authorized and required to ascertain and determine before issuing the bonds: *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654; *Sutliff v. Lake Co. Commrs.*, 147 U. S. 230, 13 Sup. Ct. Rep. 318; *Board of Commrs. of Gunnison Co. v. Rollins*, 173 U. S. 255, 19 Sup. Ct. Rep. 390. Applying this rule to the issue of 1890, the plaintiff, although a purchaser in good faith and for value, was bound to know that the city was without power to become indebted in any manner, or for any purpose, to any amount, including existing indebtedness, in the aggregate to exceed five per centum on the value of the taxable property therein; he was also bound to know from the recitals of each bond that the entire issue aggregated \$100,000; and he was bound to know the value of taxable property in the city, as ascertained by the 1890 assessment, for state and county taxes: *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Laws 1890,*

§ 37, art. 5, sec. 1. The amount of bonds and the assessed value of taxable property being known, the ratio between the two is fixed by an arithmetical calculation, and the only remaining factor is the amount of existing indebtedness. Although the territorial boundaries of the city and school districts are coincident, the debts of the latter cannot be included in determining whether the debts of the former exceed the statutory or constitutional limit: *Wilson v. Board*, 12 S. Dak. 535, 81 N. W. 952. Five per centum on the value of the taxable property in the city was \$161,144.40; therefore the bonds did not in themselves exceed the limit. Construing the bonds as in effect reciting that there was not sufficient existing indebtedness to make the aggregate exceed the limitation, the question arises whether defendant is estopped thereby from showing ⁴⁷ the amount of actual existing indebtedness. The number of cases involving the law of recitals in municipal bonds, which constantly reach the courts of last resort, both state and federal, indicate that the principles applicable to such paper have not, so far, been determined with satisfactory certainty. An examination of the adjudications will show that one of the chief causes of contention has resulted from the failure or inability of the courts to clearly define the distinction between those facts of the existence of which a purchaser must take notice and those the existence of which is conclusively established by recitals. The doctrine announced in *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, a leading case on the subject, has been frequently reaffirmed by the federal supreme court, and followed by state courts in numerous decisions. It is not modified by *Chaffee Co. v. Potter*, 140 U. S. 355, 12 Sup. Ct. Rep. 216, because in that case the statute in terms gave to the commissioners the determination of the amount of indebtedness: *Board of Commrs. v. Rollins*, 173 U. S. 255, 19 Sup. Ct. Rep. 390. In *Sutliff v. Lake Co. Commrs.*, 147 U. S. 230, 13 Sup. Ct. Rep. 318, where the statute made it the duty of the county commissioners to publish and to cause to be entered on their records, open to the inspection of the public, semi-annual statements exhibiting in detail the debts, expenditures, and receipts of the county for the preceding six months, and striking the balance, so as to show the amount of any deficit, and the balance in the treasury, the federal supreme court says: "In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or

statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which ⁴⁸ constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record: *Marcy v. Oswego Tp.*, 92 U. S. 637; *Humboldt Tp. v. Long*, 92 U. S. 642; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Lake Co. v. Graham*, 130 U. S. 674, 682, 9 Sup. Ct. Rep. 654; *Chaffee Co. v. Potter*, 142 U. S. 355, 363, 12 Sup. Ct. Rep. 216. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds."

The statute under which the bonds in suit were issued provides that the city auditor shall keep regular books of account, in which he shall enter all indebtedness of the city, which shall at all times show the financial condition of the city, the amount of bonds, orders, certificates, or other evidences of indebtedness issued by the city council; the amount of all bonds, orders, certificates, or other evidences of indebtedness which have been redeemed, and the amount of each outstanding; that he shall countersign all bonds, orders, or other evidences of indebtedness of the city, and keep accurate accounts thereof, stating to whom and for what purpose issued, and the amount thereof; that he shall report to the city council on the first days of March and September of each year the receipts and expenses and financial condition of the city, which report shall be published within thirty days thereafter in the official paper of the city, or such other paper as the council may direct; that the books so required to be kept shall be open to the inspection of all ⁴⁹ parties interested. Therefore, in the case at bar, as in *Sutliff v. Lake Co. Commrs.*, 147 U. S. 230, 13 Sup. Ct. Rep. 318, there were two facts required by the statute to be entered on the public records of the city, of which all the world is bound to take notice, and as to which the city cannot be concluded by any recitals in the bonds, namely, the value of the taxable property and the amount of existing indebtedness. As found by the trial court, the existing indebtedness on October 1, 1890, exclusive of school debt and bonds issued on that day, consisted of the following items: Bonds issued September 1, 1885, \$5,000; bonds issued June 1, 1889, \$15,000; bonds issued July 1, 1889, \$25,000; and warrants \$178,000—aggregating

\$223,000. But plaintiff contends that whereas the bonds in suit were issued for the purpose of funding and paying existing indebtedness, no new or additional debt was incurred, and that therefore such bonds are valid. Regarding the disposal of the 1890 bonds, the court below finds that they were made, executed, and delivered to various parties, for value received, on the day they bear date. As the burden of proof was upon defendant to show illegality, we should infer that they were exchanged for an equal amount of outstanding indebtedness, if such inference is required to sustain their validity, "delivery to various parties for value received" being entirely consistent with such a conclusion. But, as it might appear upon a retrial that they were not disposed of in that manner, it is proper to consider the other and more frequent method of funding existing indebtedness. It has been held by the court of last record in Wyoming, Montana, California, Kansas, Maine, Indiana, New York, and perhaps other states, that where bonds are sold for the purpose of applying the proceeds to the payment of pre-existing indebtedness, ⁵⁰ there is merely a change in the evidences of such indebtedness and no increase thereof: *Miller v. School Dist.*, 5 Wyo. 217, 39 Pac. 879; *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Board of Commrs. of Marion Co. v. Board of Commrs. of Harvey Co.*, 26 Kan. 181; *Opinions of Justices*, 81 Me. 603, 18 Atl. 291; *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31; *Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764. On the other hand, the supreme court of the United States distinguishes the two methods, and holds that, where the bonds are sold for the purpose of applying the proceeds there is an increase of indebtedness to the extent of the new issue, *Justices Brown, Harland, and Brewer, dissenting: Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220. North Dakota follows this decision, while California expressly declines to do so, and the United States circuit court of appeals in the eighth circuit says: "The distinction seems to be more nice than real, and, in view of the vigorous dissent recorded with the opinion, we may be permitted to doubt whether it will ever be made again": *Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Birkholz v. Dinnie*, 6 N. Dak. 511, 72 N. W. 931.

Doubtless, the constitutional provision under discussion was designed to confine municipal indebtedness within prescribed limits, but it could hardly have been intended or expected to

prevent embezzlement or misappropriation of public funds. In ascertaining its scope and purpose, courts are not required to assume that municipal officers are always, or even usually, dishonest. The contrary should be presumed. Where the proceeds of funding bonds are properly applied, the transaction ⁵¹ may in form be a borrowing of money, but in substance it is not different from what it would be had there been an exchange of bonds for other evidences of debt. The contemplated purpose and actual result are the same. The municipal liability is not increased, but merely suffered to remain: *Poughkeepsie v. Quintard*, 136 N. Y. 275, 32 N. E. 764. The argument that the indebtedness is instantly increased by the delivery of funding bonds, unless an equal amount of outstanding obligations is thereby extinguished, is without force where, as in this jurisdiction, available resources or assets may be considered in determining when additional indebtedness is created: *In re State Warrants*, 6 S. Dak. 518, 55 Am. St. Rep. 852, 62 N. W. 101; *Town Lots Co. v. Lane*, 7 S. Dak. 599, 65 N. W. 17. The delivery of funding bonds, when sold at par, operates as an exchange of paper promises to pay for an equal amount of money instantly available for the extinguishment of an equal amount of other promises to pay. Assuming that this money remains in the treasury until used for the purpose intended, there is no moment of time when the financial condition of the city is in any substantial manner affected. Notice to holders of matured obligations stops the running of interest, and the city, with the proceeds of its funding bonds on hand, is in as good position as it would be if in possession of the evidences of its paid obligations duly canceled. If the proceeds be misapplied, of course the debt will be increased, provided the bonds be held valid. May not the other method produce equally serious consequences? Should the officer authorized to exchange new for old bonds, disregarding his official duty, accept money instead of outstanding obligations, and should the bonds thus placed upon the market fall into the hands of bona fide purchasers, the city debt would be ⁵² increased or innocent parties made to suffer. Extravagant or corrupt officers may successfully employ either method to increase taxation or defraud bona fide creditors. Such creditors should never be made to suffer by reason of the misappropriation of funds actually received by officers of the municipality. The legitimate object of issuing funding bonds is to meet the demands of creditors entitled to payment, or to reduce the interest on fundable obligations.

By the terms of such obligations the city may have a right to pay, but cannot compel an exchange for bonds bearing a less rate of interest, and where the constitutional limit has been reached or passed, if the exchange method only is permitted a reduction of interest is impossible. Although the proposition is not free from difficulty, we are inclined to hold that the issuing of funding bonds should not be regarded as creating any new or additional indebtedness, within the meaning of the statutory or constitutional limitation applicable to this action. While the decision of this court in *Mitchell v. Smith*, 12 S. Dak. 241, 80 N. W. 1077, does not extend so far as we go in this case, the result reached therein is in harmony with the views now expressed, after a more careful and thorough examination of the questions involved. Assuming, as we must from the record in this case, that the city was owing legal, fundable debts to an amount in excess of the bonds issued October 1, 1890, it having authority to issue such bonds for the purpose of funding such indebtedness, and the issuing of such bonds not having created any new or additional indebtedness, within the meaning of the statutory or constitutional limitation, the conclusion follows that such bonds are valid; and the defendant, having sufficient funds on hand collected for that purpose, should be commanded to pay the ⁵³ amount due the plaintiff upon his coupons cut from the 1890 bonds. The bonds of 1891 contained substantially the same recitals, were issued under the same authority, and negotiated in the same manner as those of 1890. On October 1, 1891, five per centum on the value of taxable property within the city was \$301,104.20. The indebtedness, exclusive of school debt, consisted of these items: Bonds issued September 1, 1885, \$5,000; bonds issued June 1, 1889, \$15,000; bonds issued July 1, 1890, \$25,000; bonds issued October 1, 1890 (heretofore considered), \$100,000; and warrants \$212,128.48—making a total indebtedness of \$357,128.48. As the city had authority to fund its floating indebtedness, as it does not affirmatively appear that any of the outstanding warrants were illegal, as the amount of such warrants exceeded the amount of bonds issued on that day, and as the bonds then issued did not create any new or additional indebtedness, within the meaning of the statutory or constitutional limitation, it follows that such bonds are valid; and the defendant, having on hand sufficient funds collected by taxation for that purpose, should be commanded to pay the amount due plaintiff upon his coupons cut from such bonds.

The judgment of the circuit court is reversed and a new trial ordered.

MUNICIPAL INDEBTEDNESS, LIMITATION ON.—REFUNDING existing obligations by issuing bonds does not violate the constitutional limitation on municipal indebtedness, if the new obligations do not exceed in amount the old ones: See the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 240.

MUNICIPAL INDEBTEDNESS.—IN COMPUTING the indebtedness of a municipality, there can be included only the liabilities of the municipality in question, and not the obligations of another municipality of which it may be a part, or which may be a part of it: See the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 241.

MUNICIPAL BONDS.—THE IMPLIED POWER of a municipality to issue bonds is discussed in the monographic note to *Jones v. Camden*, 51 Am. St. Rep. 830, 831; *Klamath Falls v. Sachs*, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 327.

MUNICIPAL BONDS.—BONA FIDE OWNERSHIP of municipal bonds is the subject of the monographic note to *Jones v. Camden*, 51 Am. St. Rep. 822-861. Persons proposing to become creditors of a municipality must ascertain at their peril whether the credit they propose to extend will carry the municipal indebtedness beyond its constitutional or statutory limit: See the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 242.

COUGHRAN v. SUNDBACK.

[13 S. Dak. 115, 82 N. W. 507.]

APPEAL—UNDERTAKING NOT CONFORMING WITH THE STATUTE—ENFORCEMENT OF AS A COMMON-LAW OBLIGATION.—Though the statute requires that an undertaking on appeal from a judgment for the delivery of personal property to stay execution shall be, in effect, that the appellant will obey the order of the appellate court on appeal, yet, if an undertaking is given which, instead of this condition, contains one that the appellant, if the judgment is confirmed, will pay the amount directed to be paid by such judgment, and the undertaking is not questioned, and the respondent refrains from taking out any execution or otherwise enforcing his judgment on the assurance that the appeal would be taken and a sufficient bond furnished, the bond so given is a good common-law obligation, and recovery may be had of the sureties to the same extent as if it had contained the provision required by the statute.

Action upon an undertaking on appeal. Judgment for the defendants; plaintiff appealed.

A. A. Polk and Aikens & Judge, for the appellant.

Bailey & Voorhees, for the respondents.

116 FULLER, P. J. The basis of this action is an undertaking on appeal from a judgment against a sheriff, John Sundback, rendered in a claim and delivery action, and affirmed by this court in *Coughran v. Sundback*, 9 S. Dak. 483, 70 N. W. 644. Upon the theory that the terms and conditions of such undertaking, executed by Sundback as principal and Hollister and **117** Tabor as sureties, do not justify a recovery of the value of the property seized by the sheriff, and involved in the action of claim and delivery, the trial court limited plaintiff's recovery to the costs of said action in the circuit court—the judgment for costs on appeal to this court having been paid—and this appeal is from a judgment accordingly entered. Payment of the value of specific personal property involved in the former controversy was adjudged, with costs, in case delivery of such property could not be had; and the undertaking on appeal therefrom, now being considered, is (omitting venue and title) as follows: "Whereas, in the circuit court within and for the county of Minnehaha, the above-named respondent recovered a judgment against the above-named appellant, John Sundback, and the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the state of South Dakota, now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, or on a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from, or in any part thereof, be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs awarded against said appellant on said appeal." The exact question presented by this appeal is whether, in order to stay execution pending an appeal from a judgment directing the delivery of personal property, the undertaking on appeal must be drawn in accordance with section 5221 of the Compiled Laws, which provides that, "if the judgment **118** appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be delayed by the appeal, . . . unless an undertaking be entered on the part of the appellant, by at least two sureties, in such sum as the court or the presiding judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court on appeal." According to section

5219, in order "to render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars." Section 5220 is as follows: "If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment unless an undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all the damages which shall be awarded against the appellant on appeal."

In support of the judgment appealed from, counsel for respondents maintain that execution could be stayed only by an undertaking drawn in accordance with, and specifying the conditions required by, section 5221, and that the bond given covers no more than the costs adjudged in the circuit court. It is clear that an undertaking for costs is necessary, to make an appeal effectual for any purpose, and, in order to stay the execution of a judgment directing the payment of money, the undertaking ¹¹⁹ must be to pay the judgment, or such part thereof, as may be affirmed, together with all damages awarded on appeal, while, in order to stay the execution of a judgment directing the delivery of personal property, the amount of liability shall be fixed by the court, and the undertaking must be "to the effect that the appellant will obey the order of the appellate court on the appeal." Here we have in one instrument (which is, in such respect, entirely proper) an undertaking for costs and the undertaking required by section 5220; but, as none of the requirements of section 5221 are contained therein, the instrument, as a statutory undertaking, is not sufficient to stay the execution of the former judgment. Such judgment, in the usual manner of expression, directs the payment of thirty-one dollars and thirty-one cents costs, and the value of the property, in case delivery cannot be had, which is found to be eight hundred and seventy-three dollars. The undisputed evidence, admitted without objection, shows that Coughran proposed to issue execution before the undertaking under consideration was given, and was prevailed upon to forbear by repeated assurances that an appeal to this court would be taken,

and a sufficient stay bond furnished. Consequently, no steps were taken to enforce the judgment prior to the giving of the undertaking, in which the sureties justified in the sum of two thousand dollars, for the evident purpose of securing payment, upon default, of the amount found to be the value of the property, together with costs and disbursements. That such was the import of the undertaking, and that a stay had been effected, was the view that governed all subsequent conduct, and no execution issued pending the appeal. By the employment of familiar rules for the construction of contracts, and their application to these circumstances appearing of record, the intention of the parties ¹²⁰ to provide an undertaking that would operate—as valid security—as a stay of all proceedings is clearly gatherable from the writing; and parties having enjoyed the benefit of the stay contemplated ought to be held amenable, provided the instrument is good as a common-law obligation, although the amount was not fixed by the court, nor the conditions in accordance with the requirements of the statute. When execution has been actually stayed by an undertaking treated as entirely regular, though insufficient to accomplish such purpose, and the departure from the statute does not tend to defeat its object, the fact that nothing is done to enforce the judgment has generally been regarded a sufficient consideration for a common-law obligation, from which sureties cannot escape liability, and such is our conclusion: *Ryan v. Webb*, 39 Hun, 435; *Toles v. Adee*, 84 N. Y. 222; *Pray v. Wasdell*, 146 Mass. 324, 16 N. E. 266; *Goodwin v. Bunzl*, 102 N. Y. 224, 6 N. E. 399; *Field v. Schricher*, 14 Iowa, 119; *Mix v. People*, 86 Ill. 329; *Babcock v. Carter*, 117 Ala. 575, 23 South. 487, 67 Am. St. Rep. 193; *Dore v. Covey*, 13 Cal. 502. The trial court having erred in limiting appellant's recovery to the item of costs, the judgment appealed from is reversed, and the case remanded for further proceedings consistent with this opinion.

THE CASE OF *SMITH v. GALE*, 13 S. Dak. 162, 82 N. W. 385, was one brought upon an undertaking which had been filed on an appeal from a judgment for a sum of money for rent of certain premises. The defenses were that the undertaking was not executed in conformity with the requirements of the statute, and was, therefore, not a statutory undertaking, and, if construed as a common-law bond, the complaint in the case was insufficient, in that it failed to show the special facts rendering the undertaking binding as a common-law obligation. The claim that the undertaking was not good as a statutory undertaking was found to be true, because it was signed by but one surety when the statute requires two.

The next question was, whether the complaint disclosed facts sufficient to entitle the plaintiff to the enforcement of the undertaking as a common-law obligation. The only allegation in the complaint upon this subject was the execution of the undertaking. It did not set out any consideration or delivery. The court said: "That when a party seeks to recover upon a purported undertaking, not executed in conformity with the statute, he must set out fully and specially the agreement upon which the purported undertaking was given, in order that the court may see that the instrument, though not valid as a statutory undertaking, contains such an agreement as can be enforced by the court. Tested by these rules, the complaint in this case is clearly insufficient, as not alleging a cause of action against the defendant. The pleader evidently proceeded upon the theory, in drawing the complaint, that the purported undertaking constituted a valid statutory undertaking. If it had been such, the complaint would be good. But inasmuch as the instrument does not constitute a valid statutory undertaking, it is necessary for the plaintiff to set out in the complaint such special facts as will entitle him to recover, as against the defendant, upon his special contract."

AN APPEAL BOND, however much it may depart from the mandate of the statute, or may fail to give the respondent or appellee the security contemplated by the statute, is, if he accepts it, a good common-law obligation and enforceable against the sureties according to its terms: See the monographic note to *Babcock v. Carter*, 67 Am. St. Rep. 199.

HULL v. HAYWARD.

[13 S. Dak. 291, 83 N. W. 270.]

MORTGAGE—ASSUMPTION OF BY THE VENDEE—EFFECT OF UPON THE MORTGAGEE.—If the mortgaged property is conveyed by the mortgagor to one who assumes the payment of the mortgage debt, this does not affect the rights of the mortgagee, unless he elects to rely upon such assumption and to accept the vendee as his debtor. If the vendee dies, the mortgagee is under no obligation to present any claim against his estate, and remains entitled to foreclose the mortgage and to a personal judgment against the original mortgagor for any deficiency which may exist after the sale thereunder. The mortgagor cannot, by any contract between himself and a third person, relieve himself from liability or otherwise bind the mortgagee.

MORTGAGES.—A MORTGAGEE'S DELAY IN ENFORCING HIS CLAIM OR HIS OMISSION TO PROCEED AGAINST THE VENDEE OF THE MORTGAGOR, who has assumed the payment of the debt, cannot prejudice his right to foreclose his mortgage and to obtain judgment against the mortgagor for the deficiency.

MORTGAGOR'S LIABILITY ON JOINT AND SEVERAL NOTES.—If cotenants execute notes and a mortgage to secure them, it may be assumed, in support of the judgment against one of their number for a deficiency remaining after a foreclosure sale, that such notes were joint and several, and that he was properly held liable for such deficiency.

Suit by Julia H. Hull against Daniel Hayward, Charles N. Fleetwood, and others to foreclose a mortgage. Decree for the plaintiff. The defendant Hayward appealed from that part of it adjudging him liable for any deficiency which might result from a sale.

Davis, Lyon & Gates, for the appellants.

Keith & Warren, for the respondent.

202 CORSON, J. This is an appeal by the defendant Daniel Hayward from the part of a decree in mortgage foreclosure proceedings adjudging him liable for any deficiency that may result from the sale of the mortgaged premises. In 1889 the **203** appellant, Hayward, and the defendants Fleetwood and Hollister executed to the plaintiff three promissory notes, aggregating the sum of five thousand dollars, and to secure the same executed three several mortgages upon three separate and distinct lots owned by them as tenants in common. In May, 1891, Hollister conveyed his interest in the mortgaged premises to the appellant, who assumed and agreed to pay Hollister's share of the mortgage debt. In 1893 appellant conveyed his undivided two-thirds of the mortgaged premises to C. C. Carpenter, who assumed and agreed to pay two-thirds of the mortgage debt. About the same time Fleetwood conveyed his undivided one-third of the mortgaged premises to said Carpenter, but without any agreement on the part of said Carpenter to pay any part of Fleetwood's one-third of the mortgage debt. In 1895, Carpenter died, and Frances G. Carpenter was appointed executrix of his estate. The notes so executed by appellant, Fleetwood, and Hollister not having been paid, this action was instituted for the purpose of foreclosing said three mortgages. Fleetwood was not served with summons in the action. The court held that the action upon the notes was barred as against Hollister. Frances G. Carpenter in her own name and as executrix failed to appear in the action. In the eighth paragraph of the complaint it is alleged "that no personal claim is made in this action against the defendant Frances G. Carpenter, and Frances G. Carpenter as executrix, as aforesaid, or against any of the defendants herein, except the defendants Daniel Hayward, Charles H. Fleetwood, and William C. Hollister." The court, after finding the facts substantially as stated, concludes as matter of law that the respondent is entitled to a judgment of foreclosure of said mortgages, and

that, if the proceeds of said sale ²⁹⁴ should not be sufficient to pay the sums of money therein directed to be paid, respondent, Julia M. Hull, should have judgment for such deficiency against the appellant, Daniel Hayward, personally.

The appellant contends that by the purchase of the mortgaged premises and the assumption of the mortgage debt Carpenter became liable to respond directly to the mortgagee for any deficiency in case of foreclosure, and that, although the respondent as mortgagee was not privy to this agreement, yet, it being made for her benefit, she could enforce it by a personal action against Carpenter, or, after his decease, against his estate, and that she, by failing to present her claim against the estate of Carpenter, and in her complaint disclaiming any personal claim against the defendant Frances G. Carpenter, personally or as executrix of the said estate, had, in effect, released the appellant, Hayward, from his personal liability for any deficiency upon the mortgages. Under the findings in the case, this contention cannot be sustained. By the twelfth finding of fact, the court finds "that the plaintiff never had any communication or correspondence with said Charles C. Carpenter relative to the said mortgage indebtedness, and never had any communication from or with, or correspondence with, said Hayward relative to the subject of Carpenter's assumption of said mortgage indebtedness, except as stated in the foregoing finding No. 11, and that in receiving the interest on said notes the plaintiff had no personal knowledge by whom such interest was paid." By the eleventh finding of fact therein referred to, the court finds that shortly after the conveyance by the appellant to Carpenter he notified the plaintiff by letter of the conveyance, and that said Carpenter had assumed the mortgage ²⁹⁵ indebtedness, and would pay the interest. It will thus be seen that the plaintiff in no manner accepted the said Carpenter as her debtor, and in no manner released the parties executing the said notes and mortgages from their liability upon the same to her. She was not bound, therefore, to proceed against the estate of Carpenter, or make any claim against his estate, either by presenting her claim thereto, or in this action for the foreclosure of the mortgages. Appellant could not, by any contract between himself and Carpenter, bind the plaintiff, or relieve himself from his liability to her upon the notes and mortgages. It may be conceded that, if the respondent desired to hold Carpenter or his estate for two-thirds of the amount of these mortgages, she might have done so, but, as before

stated, without some agreement on her part she cannot be compelled to resort to him or his estate for the amount due upon her mortgages.

While the respondent, after notice by the appellant that he had transferred his interest in the property, might not do any affirmative act that would prejudice the rights of the appellant (*Dilliway v. Peterson*, 11 S. Dak. 210, 76 N. W. 925), mere delay in enforcing her claim, or the omission to proceed against the estate of Carpenter, would not affect her rights as against the appellant: *Clark v. Douglas*, 58 Neb. 571, 79 N. W. 158; *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Ashby v. Johnston*, 23 Ark. 163, 79 Am. Dec. 102. We may assume in support of the judgment that the notes executed by appellant and his cotenants were joint and several, and, this being so, the appellant was very properly held individually liable for any deficiency which may occur upon the sale of the mortgaged premises. The judgment of the court below is affirmed.

MORTGAGE. ASSUMPTION OF BY GRANTEE.—If the grantee of mortgaged premises assumes the mortgage thereon, the mortgagee may treat both the grantee and the grantor as principal debtors, and may have a personal decree against both: See the monographic note to *Klapworth v. Dressler*, 78 Am. Dec. 74.

KARCHER v. GANS.

[13 S. Dak. 383, 83 N. W. 431.]

HOMESTEAD—SALE OF UNDER A POWER.—Under a constitution or statute exempting homesteads from forced sale, they may be sold by the consent of the owner, and such consent is given by the execution of a valid mortgage thereon with a power of sale, and such consent and power cannot be avoided after the execution of the mortgage.

HOMESTEAD—FORCED SALES OF—WHAT ARE NOT.—A foreclosure sale, though under a power contained in a mortgage or in pursuance of a decree, is not a forced sale within the meaning of a constitution or statute prohibiting the forced sales of homesteads.

HOMESTEAD. — ACKNOWLEDGMENT OF A CONVEYANCE OR OF A MORTGAGE UPON A HOMESTEAD BY A WIFE who has signed it is not necessary under a statute which declares that a conveyance or encumbrance of a homestead shall be of no value unless the husband and wife concur in and sign the same instrument.

HOMESTEAD.—AN ESTOPPEL AGAINST A MARRIED WOMAN'S DENYING that a mortgage of a homestead was properly executed arises when the instrument signed by her has at-

tached thereto a certificate of acknowledgment in due form, and she has for some four years acquiesced in the mortgage, paid interest, and secured an extension of the time for redemption.

THE DELIVERY OF A MORTGAGE OF A HOMESTEAD BY A WIFE WILL BE PRESUMED as against her when she joined with her husband in signing and acknowledging it, and he subsequently delivered it. Having permitted her husband to take and use such mortgage according to his own judgment, she has no right to complain when he delivered it in accordance with its terms and manifest purposes.

MORTGAGE—FORECLOSURE OF UNDER A POWER.—There is no necessity of a mortgagee's making any entry into the possession of mortgaged premises as a prerequisite for foreclosure.

SHERIFF.—THE OMISSION OF A SHERIFF TO INDORSE THE AMOUNT OF A BID ON A NOTE AND MORTGAGE cannot prejudice a purchaser at a foreclosure sale. He has no control over the sheriff, and if the mortgagor suffers damage, his remedy is by an action against the sheriff.

REDEMPTION—AGENT'S AUTHORITY TO EXTEND TIME FOR.—The authority of an agent to foreclose a mortgage does not authorize him to extend the period allowed for redemption from a sale thereunder.

APPELLATE PROCEDURE—PRESUMPTION IN FAVOR OF JUDGMENT.—If when an instrument is offered in evidence, it is objected to on the ground that erasures appear in the certificate of acknowledgment, and the objection is overruled, it will be presumed, on appeal, that the court ruled correctly unless the condition of the instrument is disclosed by the record.

Action of forcible entry and detainer. Judgment for the plaintiff. Defendant appealed.

Albert Gunderson, T. W. La Fleiche, W. A. Lynch, and T. H. Null, for the appellant.

Horner & Stewart, for the respondent.

387 CORSON, J. This is an action in forcible entry and detainer, originally commenced in a justice's court, but, upon an answer being filed claiming title to the property by the defendant, it was certified to the circuit court, where the case was tried by the court with a jury, and a verdict directed in favor of the plaintiff. From the judgment and order denying a new trial defendant has appealed to this court.

The facts may be briefly stated as follows: In February, 1895, Frank A. Keys and the defendant, Hattie E. Gans, who was then his wife, executed to the plaintiff a promissory note for the sum of eight hundred dollars, due and payable on the twelfth day of January, 1896, and secured the same by a mortgage on the property occupied by himself and the defendant, situated in the city of Pierre. In December, 1896, the plaintiff

foreclosed said mortgage by advertisement, under the power of sale contained in the mortgage. Before the expiration of the first year of redemption, the defendant paid the interest as provided by statute, and thereupon the period of redemption was extended for the second year. On the first day of February, 1899, no redemption having been made of said premises, a deed was issued by the sheriff of Hughes county to the plaintiff and respondent herein for the mortgaged premises. On the tenth day of February, 1899, a notice to quit and vacate the premises was served upon the appellant, and, she failing to vacate the same, this action was commenced in the justice's court, as before stated. Numerous errors are assigned, but we shall only discuss such of them as are pressed in appellant's brief.

The appellant contends, first, that a mortgage given by a husband upon a homestead, and signed by the wife, is void and cannot be foreclosed in this state, for the reason that the foreclosure ³⁸⁸ proceedings amount to a forced sale of the homestead, and are therefore within the provisions of the constitution of the state prohibiting a forced sale of the homestead. In support of this contention, the learned counsel for the appellant cite a number of decisions from different courts which have held such a sale void, but upon a review of these decisions it will be found that they were made under constitutional or statutory provisions entirely different from those of this state. Section 4 of article 21 of the constitution of this state declares: "The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale a homestead, the value of which shall be limited and defined by law, to all heads of families, and a reasonable amount of personal property, the kind and value of which to be fixed by general laws." It will be noticed that the exemption of a homestead is from a "forced sale," and the same term is used in the statute which was enacted to carry the provisions of the constitution into effect. The theory of counsel for the defense seems to be that a sale made of mortgaged homestead property by advertisement or on execution is a forced sale, within the meaning of this section, but this theory cannot be sustained. Where parties have executed a mortgage in which they have authorized the mortgagee, in case of default in payment, either to sell the property by advertisement, under the statute, or to foreclose and sell the same under a judgment of foreclosure, they have consented to such sale; and the sale

is not, therefore, a forced sale, within the meaning of the constitution and law exempting homesteads. Whether the sale is voluntary or forced depends, not upon the mode of its execution, but upon the presence or absence of the consent of the ³⁸⁹ owner. If the framers of the constitution had intended that the homestead should be exempt from any sale other than an absolute conveyance, they certainly would have prohibited in express terms the giving of a mortgage or otherwise encumbering a homestead, as is done in the constitutions or statutes of several of the states. Thompson, in his work on Homesteads, states the general rule as follows: "The general rule is, that statutes creating a homestead exemption do not operate to restrain in any particular the voluntary alienation or mortgage of the homestead, unless it is so expressed. A mere exemption from forced sale does not have this effect": Thompson on Homesteads and Exemptions, sec. 453. Waples on Homesteads, page 714, states the rule thus: "Manifestly, if the homestead has been duly mortgaged by man and wife, they can have nothing to say against its foreclosure on the ground of any remaining homestead rights. All these rights went when they made the mortgage, and the mortgagors are presumed to have had the quid pro quo." The state of West Virginia has a constitutional provision quite similar to our own. It provides as follows: "Any husband or parent residing in this state or the infant children of deceased parents may hold a homestead to the value of one thousand dollars and personal property to the value of two hundred dollars, exempt from forced sale, subject to such regulations as may be prescribed by law": W. Va. Const., art. 6, sec. 48. The supreme court of that state, in *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. 303, after a full review of the authorities, held: "The sale of a homestead under a deed of trust or under a decree of foreclosure of mortgage thereon is not a forced sale, within the meaning of the constitution, which exempts a homestead from forced sale." In *Peterson v. Hornblower*, 33 Cal. 266, the supreme court of that state gave a construction to the ³⁹⁰ term "forced sale," as used in their constitution, and that learned court says: "The constitution (Const., art. 11, sec. 15) provides that 'the legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families.' The several homestead acts were enacted to give effect to this provision. A 'forced sale' is not synonymous with a 'sale on execution,' etc. The latter may be, and often is, voluntary in

every respect. When the owner consents to a sale under the execution or other legal process, the sale is not forced, but is as voluntary within the full import of the term, as it is when he directly effects the sale and executes the conveyance. Its quality, as being voluntary or forced, depends, not upon the mode of its execution, but upon the presence or absence of the consent of the owner. If those terms were synonymous, or were so understood by the legislature, the provisions would have been that the homestead shall not be subject to sale under execution or other legal process. As the clause now stands, and with the interpretation contended for, no meaning or effect can be given to the word 'forced.' We remarked that where the owner of the homestead consents to a sale under execution or other legal process, it is not a forced sale. It makes no difference, in respect to its being forced or voluntary, whether he consents directly to the sale, or does the same indirectly, by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. A foreclosure sale, whether under the power of sale contained in the mortgage, or in pursuance of a decree, is not a forced sale, within the meaning of the constitution or the statute": 15 Am. & Eng. Ency. of Law, 2d ed., 664; Jones v. Yoakam, 5 Neb. 265; Gee v. Moore, 14 Cal. 472; Rector ³⁹¹ v. Rotton, 3 Neb. 171; Patterson v. Taylor, 15 Fla. 336; Smith v. Mallone, 10 S. C. 39; Dawson v. Hayden, 67 Ill. 52; Dye v. Mann, 10 Mich. 291; Chamberlain v. Lyell, 3 Mich. 448; Stewart v. Mackey, 16 Tex. 56, 67 Am. Dec. 609; Smith v. Marc, 26 Ill. 150; Godfrey v. Thornton, 46 Wis. 677, 1 N. W. 362. It is quite clear, both on principle and authority, that the contention of the appellant that, as the property was a homestead, the mortgage was void, is without merit.

Appellant calls our attention to the provisions of chapters 76 and 77 of the Laws of 1891, and contends that these provisions have materially changed the law of this state; but, in the view we take of them, they do not affect the question now under consideration.

It is further contended on the part of the appellant that the court erred in sustaining the objections of respondent to a number of questions propounded to the appellant when a witness on her own behalf, which were, in effect, as to whether or not she had acknowledged the mortgage in controversy before one T. H. Conniff, as notary public. The mortgage itself contains the certificate of T. H. Conniff, under his seal as notary

public, certifying that on the twelfth day of January, 1895, the said appellant, under her then name of Hattie E. Keys, appeared before him and duly acknowledged the mortgage. The testimony of the witness was apparently offered for the purpose of impeaching this certificate of the notary. The decisions of the courts are not in harmony upon the question of the admissibility of evidence to contradict the certificate of the notary in any case, and we do not deem it necessary to decide that question in this case. It is insisted on the part of the respondent that, as it is conceded the appellant signed the mortgage with her ³⁹² husband, it is immaterial in this case whether she acknowledged it or not. Section 2451 of the Compiled Laws provides as follows: "A conveyance or encumbrance by the owner of such homestead shall be of no validity unless the husband and wife, if the owner is married and both husband and wife are residents of the territory, concur in and sign the same joint instrument." This section was amended by chapter 76 of the Laws of 1891, but the amendment did not affect the question we are now considering. The section was in effect again amended by chapter 77 of the Laws of 1891, as to the conveyance of a homestead, but no change was made in regard to encumbrances. It will be noticed, by the section quoted, that the husband and wife must concur in and sign the same joint instrument. Nothing is said in regard to acknowledgment. It would seem, therefore, that when a wife concurs in and signs the same joint instrument, it is immaterial as to whether or not she has acknowledged the same. This was the view taken of a similar statute in Wisconsin in *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362: See, also, *Lawver v. Slingerland*, 11 Minn. 447.

But there is another ground upon which the court's ruling can be sustained. The mortgage had been in existence about four years. The appellant had paid the interest and secured an extension of the time for redemption under the statute, and, so far as the record discloses, prior to the filing of the answer in this case the appellant had made no objection to the mortgage, but had apparently recognized it as valid and binding upon her. Under such circumstances she is estopped from claiming the mortgage was not properly acknowledged by her. In *Norton v. Nichols*, 35 Mich. 148—a similar case—the supreme court held both husband and wife estopped from impeaching ³⁹³ the mortgage. In that case that learned court said: "Mrs. Norton knew the purpose of the mortgage, and that

the mortgagee relied on it as valid, and that it was valid on its face. Instead of attempting to repudiate it and give timely information to Mr. Nichols that the mortgage was not what she had done her best to make it appear, she gave no information, and allowed her husband to reap all the benefits of the loan, only objecting when steps were taken to foreclose it. Whatever may be the rule concerning the formalities needed to bind married women, there is no doubt that they may be estopped by their deliberate conduct as well as anyone else. The cases of *Sharpe v. Foy*, 4 Ch. App. Cas. 35, and *In re Lush's Trusts*, 4 Ch. App. Cas. 591, are analogous and in point. And the circumstances of this case show that the defendant would be grossly defrauded by the complainant's course if this mortgage is allowed to be set aside. There is no equity whatever in the bill, which on its face is an attempt, without any merit, to evade an honest claim, which could never have been created unless the complainants had both done what they could to create confidence in it. If a court can ever set aside a conveyance for a mere omission which is made out by contradicting an official act where there has been no fault in the claimant—a point which we have no occasion to discuss—it certainly will not do so when the party complaining has not only consented to the act, but has never taken any course to repudiate it, or to save the grantee from the effects of confidence in its validity.” In *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. 362, the supreme court of Wisconsin, speaking by Mr. Chief Justice Ryan, quotes with approval from the opinion in *Norton v. Nichols*, 35 Mich. 148, and concludes as follows: “Every essential word of this opinion applies with ³⁹⁴ equal force to the present case.” And it seems to us that the same principle should apply in this case. Here, so far as the record discloses, the appellant signed the mortgage without objection, knew that her husband was receiving respondent's money, and yet for four years gave no intimation that she did not properly acknowledge the mortgage as certified to by the notary public. She does not claim that there was any fraud or duress practiced upon her, or that she did not fully understand the nature of the transaction. To permit her, therefore, after so many years, to impeach the validity of this mortgage upon the technical ground that there was a defect in the acknowledgment on her part, would be to allow her to take an unfair advantage of the respondent, who advanced her money in good faith.

It is further contended by the appellant that the mortgage was not delivered by her, but as she joined in the execution of the same with her husband, Frank A. Keys, and he delivered the same, such delivery will be presumed to be with her consent: *De Arnaz v. Escandon*, 59 Cal. 486; *Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303. In *De Arnaz v. Escandon*, 59 Cal. 486, the supreme court of California says: "Being conclusively bound by the certificate of acknowledgment, which shows her knowledge of the contents of the deed, and having permitted her husband to take and use it according to his own judgment, the wife has no right to complain that he delivered it in accordance with its terms and manifest purpose. 'Under such circumstances,' as said by the court in the case last cited [*Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303], 'a delivery by him must bind her as well as himself. The grantee may properly regard her execution and acknowledgment of the instrument as evidence of her consent to its ³⁹⁵ delivery, and if, without notice of her dissent, it is delivered by the husband, she cannot afterward be permitted to question his right to do so, without allowing a fraud to be practiced against the grantee. Were it otherwise, a large majority of all the deeds executed by husband and wife within this state have never been delivered by the wife, and would not bind her.'"

It is next contended by the appellant that the court erred in admitting in evidence the auctioneer's affidavit, sheriff's certificate of sale, sheriff's deed, and also the certificate of the payment of interest and interest in advance. These instruments were objected to on the ground that there had been no entry into possession by the mortgagee prior to the alleged foreclosure, and that the officer's affidavit and certificates were insufficient, and that the officer making the sale made no indorsement upon the note and mortgage of the amount received at the sale. It is insisted on the part of the respondent that the question that there was no entry into possession before foreclosure was not raised at the trial, and is made by appellant for the first time in her brief in this court. But whether raised or not in the trial court is not very material, under the view we take of the question. In some states foreclosures are instituted by an entry upon the property, but in this state no such method of foreclosure is provided. Hence the term "entry," used in the mortgage in this case (probably inadvertently copied from some old form book), is without meaning under our system. The failure of the respondent to perform the idle cere-

mony of making an entry upon the property constituted no ground for excluding the various instruments offered in evidence. Neither did the fact that the sheriff omitted to indorse ³⁹⁶ the amount of the bid upon the note and mortgage constitute any ground for excluding the instruments. These were duties required of the sheriff, over which the purchaser at the sale had no control. If the sheriff failed to perform his duty, and the appellant has suffered therefrom, she may have a remedy against the sheriff. The affidavit and certificates of the officers substantially complied with the law.

It is further contended on the part of the appellant that the sheriff's deed was void for the reason that at the time it was executed the respondent had extended the time of redemption, and that that time had not expired. It appears from the evidence that some time prior to the expiration of the last year of redemption, the appellant's attorney and the agent for the respondent in the foreclosure proceedings had several conversations in regard to extending the time of redemption. It is claimed that there was an understanding between the said agent and the appellant's attorney that the period of redemption should be extended twenty days. No written agreement was entered into, and it is not shown that the agent had any authority to enter into this agreement. Notwithstanding the alleged agreement, the sheriff's deed was executed soon after the regular time of redemption had expired by law. We are inclined to take the view that the authority of the agent to foreclose the mortgage did not authorize him to extend the period of redemption, and, assuming that there was such an agreement on the part of the agent as claimed by the appellant, in the absence of competent proof that the agent was specially authorized to make such an agreement the respondent was not bound.

It is further contended on the part of the appellant that the court erred in excluding evidence offered by the appellant ³⁹⁷ tending to prove that there was a change or erasure made in the certificate of the notary. This question is not presented by the record in such a manner that this court can consider it. When the mortgage was offered in evidence, there seems to have been some objection to it made by counsel for the appellant, on the ground that it appeared there were erasures in the notary's certificate, which was not shown to be in the same condition that it was. What these erasures were does not appear from the abstract, and we must presume, there-

fore, in favor of the judgment, that the court below ruled correctly in overruling the objection. The judgment of the court below and the order denying a new trial are affirmed.

HOMESTEAD, FORCED SALE.—A sale of a homestead under a deed of trust or under a decree of foreclosure of a mortgage thereon is not a forced sale within the meaning of a constitutional provision exempting homesteads from forced sales: *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. 303. But, in *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762, it is said that a sale under foreclosure comes within the description of a forced alienation, and that the homestead of a husband and wife cannot be so sold, even though they may have voluntarily pledged the property as security, and by implication agreed that it should be subjected to a decree of foreclosure and sale.

HOMESTEAD.—ON THE CONVEYANCE OR ENCUMBRANCE of homesteads as affecting the rights of wives therein, see the monographic notes to *Poole v. Gerrard*, 65 Am. Dec. 482-489; *Alt v. Banholzer*, 12 Am. St. Rep. 683-686.

RUTH v. WELLS.

[13 S. Dak. 482, 83 N. W. 568.]

A JUDGMENT LIEN CANNOT BE PROLONGED BY A COURT OF EQUITY beyond the period fixed by the statute, though the suit is commenced and at issue within such period, but is not reached for trial until after the expiration thereof. Courts must apply statutes enacted without excepting anyone from the operation thereof, regardless of what they may think the legislature would have done if certain conditions had been considered; and when such statutes begin to run, judicial power cannot arrest their action.

LIS PENDENS.—The filing of a notice of action to enforce a judgment lien cannot, where the lien has expired before the action is tried, have any effect in extending the lien, nor entitle the judgment creditor to enforce it in any manner.

Action to enforce the lien of two judgments. Judgment for the defendant; plaintiff appealed.

Moody, Kellar & Moody, Edwin Van Cise, and W. R. Steele, for the appellant.

McLaughlin & McLaughlin, for the respondents.

⁴⁸⁴ **FULLER, P. J.** To enforce the lien of two judgments rendered and docketed in the year 1887, on the thirty-first day of August and the thirteenth day of October, respectively, this action in equity was commenced on the thirty-first day of July, 1897, but, owing to an adjournment of the first term at which

the action was triable from September 14, 1897, to November 23d immediately following, more than ten years had elapsed since the docketing of the judgments, and the court, adopting the theory of defendants' counsel, dismissed the action for the reason that the liens sought to be enforced were lost by operation of law, and plaintiff appeals from a judgment accordingly entered.

On the twentieth day of January, 1890, the judgment debtor acquired the real property described in the complaint, and a few days prior to his death, which occurred on the fourteenth day of July, 1891, he conveyed a certain interest therein to his wife, the respondent Florence Pierce, and another interest to George C. Hickok, the grantor of the respondent Nathan W. Wells, who is still the owner thereof. On the twelfth day of January, 1892, respondent Florence Pierce mortgaged her interest to the defendant Grosbach, who failed to appear in this action, and requires no further attention. By his last will the judgment debtor, Moses Pierce, deceased, appointed his wife, the respondent Florence Pierce, executrix, and said George C. Hickok executor thereof; and, while appellant's claim was duly presented and allowed, it is contended that an alleged delay of a little more than two months in the course of administration should be deducted from the ten years' time that a judgment is a lien, under the following statutory provision: "On filing a judgment-roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the court in which it was rendered in a book to be known as the judgment docket, . . . and it shall be a lien on all the real property, except the homestead, in the county where the same is so docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter for ten years from the time of docketing the same in the county where it was rendered": Comp. Laws, sec. 5104. The controlling question is whether the lien of a judgment upon real property given by the foregoing statute may be prolonged by a court of equity beyond the period fixed thereby, when a suit to enforce the same is commenced and at issue within such period of ten years, but not reached for trial until after the expiration thereof. According to a well-known rule, courts must apply statutes enacted without excepting anyone from the operation thereof, regardless of what they may think the legislature

would have done if certain contingencies had been considered; ⁴⁸⁶ and when such statutes begin to run it is beyond judicial power to arrest their action. In other words, the legislature makes the law, and, as the courts find it, so must it be used, without excepting therefrom cases clearly within its provisions, and without the extension of its terms to cases neither within its spirit or reason. Appellant's right of action accrued years before the commencement of this suit, the maintenance of which was not impeded by the death of the judgment debtor or the pendency of administration, and this court has no power to extend the lien of his judgments beyond the statutory period. In *Adams v. Crosby*, 84 Tex. 99, 19 S. W. 355, that court, in construing a statute which makes a judgment a lien on land for twelve months from the date thereof, held that a judgment ceases to be a lien at the end of twelve months, even though a levy was made under execution within that period; and a purchaser at the sale held after the expiration thereof, acquired nothing. Under the Minnesota statute a judgment survives, and the lien thereof continues, for the period of ten years, and it was held that the commencement of an action within such time, to subject real property to the satisfaction of a judgment, did not operate to extend such period, and that by its expiration during the pendency of such action both the lien and the judgment ceased to exist: *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732. In this case, after citing a large number of authorities to the effect that the pendency of an execution levied during the life of a lien will not extend the same beyond the statutory period for which a judgment is made a lien, and that the sale must take place within that period, the court say: "It is true that these are all cases where the judgment creditor was proceeding entirely under his execution at law against ⁴⁸⁷ property which could be taken and sold upon it. But we think they are in principle entirely analogous to the case at bar. We fail to see any distinction in principle between a case where, for the purpose of enforcing his judgment, a party resorts to execution to reach property liable to such process, and a case where, for the same purpose, he proceeds by creditor's bill or supplementary proceedings to reach assets not subject to execution. In both cases the object is the same—to reach property of the debtor in order to satisfy an existing judgment—and there is no more reason why a creditor's bill or supplementary proceedings (which are a statutory substitute for the former) should continue the life of a judgment beyond the

statutory period in the one case than that a levy under an execution should do so in the other. We are, therefore, of opinion that plaintiff's judgment became barred, and ceased to exist, either as a cause of action or as a lien, during the pendency of this action." It has been so held where an execution was levied and an action commenced to enforce the lien before the expiration of the time fixed by statute, and the postponement was pursuant to an agreement of all the parties: *Gardenhire v. King*, 97 Tenn. 585, 37 S. W. 548.

Under a statute creating a lien for ten years by the docketing of a judgment, the court, in *McCaskill v. Graham*, 121 N. C. 190, 28 S. E. 264, say: "Where one buys land subject to a judgment lien, his title is freed from the encumbrance after the lapse of ten years from the date of the docketing." Courts of equity must follow the statute creating a judgment lien, and, when the time of its duration has expired, it is not enforceable, either at law or equity: *Hutcheson v. Grubbs*, 80 Va. 251. In *Isaac v. Swift*, 10 Cal. 71, 70 Am. Dec. 698, the court, in holding that the levy ⁴⁸⁸ and sale must both be made within the period of two years limited by statute, say: "It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified." To the proposition that the general statute of limitations, in so far as it relates to that which prevents the running of such statute, has no application to the duration of a judgment lien which "the mere lapse of time annihilates," the case of *State v. Fidelity etc. Co.*, 77 Iowa, 648, 42 N. W. 509, is in point. In Indiana, as in this state, the duration of a judgment lien for a period of ten years is fixed by statute. In a recent case, where an action was brought by a judgment lienholder to subject land to the payment of his judgment, it was found that at the time the suit was commenced the lien of the judgment was valid, and superior to the rights of all others, but that before the trial of said cause the ten years' limitation had expired; and it was held that the plaintiff could not recover, and that it was error to enter a decree subjecting the land to the payment of the judgment. The ruling is put upon the theory that the courts have no power to extend the lien of a judgment: *McAfee v. Reynolds*, 130 Ind. 33, 30 Am. St. Rep. 194, 28 N. E. 423. In such cases the existence of a cause of action at the time the suit is commenced, and its statement in the complaint, is not without proper proof, sufficient to justify a decree in accordance therewith; and when, in the meantime, a lien sought to be en-

forced on land was rendered lifeless by positive and inexorable law, the action cannot be maintained, because the right existing only by force of statute has been by force of statute destroyed and lost by the lapse of time: *Cotton v. Bank*, 51 Neb. 751, 71 N. W. 711; *Nutt v. Cuming*, 22 N. Y. App. Div. 92, 47 N. Y. Supp. 800; ⁴⁸⁹ *Boyle v. Maroney*, 73 Iowa, 70, 5 Am. St. Rep. 657, 35 N. W. 145; *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109; *Bradfield v. Newby*, 130 Ind. 59, 28 N. E. 619; *Bridges v. Cooper*, 98 Tenn. 394, 39 S. W. 723. Manifestly, the notice of the pendency of the action filed by appellant would not operate to prolong his judgment liens, as the only effect of a *lis pendens* is to impart constructive notice to subsequent purchasers or encumbrancers of the property affected thereby: *Comp. Laws*, sec. 4897. The rule of universal importance to the owners of real property and society in general is that time, when it has once commenced to run by operation of statute, will not cease to do so by reason of any subsequent event or condition for which the statute has not expressly provided. While an occasional hardship may result from a delay for which the party is in no way responsible, the statute is beneficial during its lifetime, rests upon sound public policy, and it must be construed to effectuate the intention of the legislature. Our conclusion, therefore, is that the lien of appellant's judgments terminated before the trial, and the judgment appealed from is affirmed.

A JUDGMENT LIEN CANNOT BE PROLONGED by a court beyond the period fixed by the legislature: *McAfee v. Reynolds*, 130 Ind. 33, 30 Am. St. Rep. 194, 28 N. E. 423. If the limitation of action on a judgment is seven years, the right of action upon it is barred after the lapse of that period, notwithstanding the issuance of an execution before the expiration of that time: *Berkson v. Cox*, 73 Miss. 339, 55 Am. St. Rep. 539, 18 South. 934.

THE LAW OF LIS PENDENS is the subject of the monographic note to *Stout v. Philippi etc. Co.*, 56 Am. St. Rep. 853-878.

PITTS v. OLIVER.

[13 S. Dak. 561, 83 N. W. 591.]

RES JUDICATA.—Where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or judgment is rendered, and does not extend to matters which might have been, but were not, litigated and determined in the former action.

RES JUDICATA—EFFECT UPON PLAINTIFF OF ISSUES LITIGATED BETWEEN DEFENDANTS.—If in an action to foreclose a mortgage upon chattels, two of the defendants present and have litigated the question of whether one of them is liable to the other for negligence in the care of such chattels, the finding and judgment do not conclude the plaintiff, and a recovery by one of the defendants from the other for such damages does not prevent the plaintiff from maintaining a subsequent action against the same defendant for damages suffered by the plaintiff from such defendant's negligence in the care of the same property.

RES JUDICATA.—PLAINTIFF IS NOT CONCLUDED BY THE RESULT OF A LITIGATION BETWEEN TWO DEFENDANTS in an action concerning a matter upon which the plaintiff's complaint tendered no issue.

Action by Pitts and others as partners to recover of the defendant Oliver damages for negligence in the care of sheep. The defendant pleaded in his answer certain pre-existing litigation and the judgment therein. Plaintiff moved to strike out this plea. The motion was denied, and the plaintiff appealed.

Wright & Huddle, for the appellants.

A. B. Kittredge, for the respondent.

563 CORSON, J. This is an appeal from an order denying plaintiff's motion to strike out paragraphs 4 and 6 from the defendant's answer. The action was brought by the plaintiffs to recover of the defendant damages for neglecting to take proper care of a flock of sheep which had been mortgaged to the plaintiffs and defendant, by which plaintiffs sustained damages to the amount of eight hundred and fifty-one dollars and ten cents. The paragraphs sought to be stricken out from the answer are as follows: "4. . . . And this defendant alleges, as a bar to the cause of action set out by the plaintiffs in this suit, that in the action above described, then pending in said court between said parties, and for the same causes of action as those set forth in the complaint herein, findings of fact and conclusions of law were duly made and given, and thereon judgment was duly

given and entered of record, as appears by said findings of fact, conclusions of law, and the rendition and entry of said judgment which was given to this plaintiff; and said judgment has not been reversed, and this plaintiff has not appealed therefrom. And this defendant further alleges that in said action between the parties aforesaid the court had jurisdiction over the subject matter, as well as said parties, and the questions of fact were the same as in this action, and were necessary to its decision, and in fact were or might have been, litigated in said action, and were comprehended and involved therein, and all of said facts were well known to the plaintiff at all times, and said hearing and judgment were rendered upon the merits of the action. The defendant expressly denies each and every allegation in said paragraph No. 7 of plaintiff's complaint, except as hereinbefore admitted or qualified." "6. This defendant, for a further and separate defense to the plaintiff's complaint herein, and as an ⁵⁶⁴ estoppel, repeating the admissions, denials, and allegations contained in paragraph 4 of this answer, alleges that among other things found by the court was that 'from April 6, 1895, to February 1, 1896, this defendant was guilty of negligence in feeding, caring for, and attending to said sheep, and as a result of such negligence the said flock of sheep was damaged, in losses of sheep and losses of increase and deterioration of the flock, in the sum of three hundred and fifty dollars,' and that the court rendered judgment reducing this defendant's lien, which was superior to the lien of this plaintiff, to the extent of the said sum of three hundred and fifty dollars, and that this plaintiff received benefit to that extent, and has acquiesced therein, by not appealing, and by receiving the amount left after satisfying this defendant's lien."

This is the third appeal to this court of this case, and the facts involved are stated in the decisions on the former appeals, which are reported in *Bank v. Price*, 9 S. Dak. 582, 70 N. W. 836, 12 S. Dak. 184, 80 N. W. 195. It is stipulated by the parties that, in order to raise the questions presented, the defendant is not required to set out in full, or by exhibits, the record, files, proceedings, including the pleadings, findings of fact, conclusions of law, final judgment, or other papers, in the former case, but the same shall be deemed to be a part of the plea of *res judicata* by reference, and shall be looked to in determining said questions with like force and effect as though the same were set out in full in defendant's answer. In order that the questions presented by the defenses sought to be

stricken out may be understood, a brief recapitulation of the facts and pleadings involved in the former suit will be made. In 1895 one Tidrick sold to M. M. Price a flock of eight hundred and forty sheep. ⁵⁶⁵ To make up the number, he purchased of Oliver six hundred and seventy sheep. Price executed a chattel mortgage on these sheep to Tidrick to secure the amount of the purchase money, and Tidrick, to secure Oliver for the value of the sheep purchased of him, assigned to him notes executed by Price for about two thousand three hundred dollars. Tidrick subsequently assigned the balance of the notes and the mortgage to the plaintiffs, but, by an agreement between the plaintiffs and Tidrick, Oliver's notes were to have priority over those of the plaintiffs in payment. The notes not being paid, the plaintiffs brought an action against Price to foreclose the chattel mortgage, making Oliver a party to the action. Oliver answered the complaint of the plaintiffs, also asking the foreclosure of the chattel mortgage, and claiming that his notes should be first paid out of the proceeds of the mortgaged property, and in his answer he set up a cross-claim against Price for the care of the sheep for nearly two years. Price, in his answer to this cross-claim, made a counterclaim against Oliver for damages for negligence in the care and keep of the sheep, of which sheep Oliver had wrongfully taken possession, by reason of which a large number of sheep had died. These issues between Oliver and Price were tried by the court, and resulted in a finding in favor of Oliver for one thousand dollars for the care and keep of the sheep, less three hundred and fifty dollars found in favor of Price for negligence in keeping the sheep. A judgment was thereupon entered for the sale of the mortgaged property, and one hundred and eighty dollars of the proceeds, after paying Oliver's claim, was paid over to the plaintiffs, leaving an unsettled balance of about eight hundred and fifty dollars, for which execution was issued against Price, and returned wholly unsatisfied. The action of the plaintiff was to recover the amount due upon the notes described in the complaint, and to foreclose the chattel ⁵⁶⁶ mortgage given to secure the same; and no relief was claimed against Oliver, except in so far as the distribution of the fund realized upon the sale of the mortgaged property was concerned, and no personal judgment of any kind was asked for as against Oliver. Therefore no issue involving any question of damages by reason of the negligent care and custody of the sheep on the part of Oliver was presented by the plaintiffs'

complaint; the only issue upon that question being raised by the two defendants, Oliver and Price. The present action is, therefore, in our view of the case, upon an entirely different cause of action from that presented by the original complaint and answer, as between the plaintiffs and Oliver. The question of damages, therefore, involved in this case could not have been properly litigated in the former action, as between the plaintiffs and defendant Oliver.

In *Howard v. Huron*, 6 S. Dak. 180, 60 N. W. 803, this court quoted with approval from the opinion of the supreme court of the United States in *Cromwell v. Sac Co.*, 94 U. S. 351. The distinction is made in that case between the effect of a judgment as a bar or estoppel in the same action and as a bar or estoppel in another action. In that quotation is the following: "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is ⁵⁶⁷ strictly accurate, when applied to the claim or demand in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." In *Russell v. Place*, 94 U. S. 606, that learned court uses the following language: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this opera-

tion of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic ⁵⁶⁸ evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.” Again, in *Davis v. Brown*, 94 U. S. 423, that court uses the following language: “When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence.” In *Freeman on Judgments*, section 253, that learned author states the rule as follows: “But in a subsequent action involving a different subject matter, the former adjudication cannot be relied upon, unless it appears, not that the issue now presented was presented, and ought to have been litigated, in the prior action, but, further, that it was litigated and decided, as well as involved.” The distinction is clearly shown in the case of *Terreri v. Jutte*, 159 Pa. St. 244, 28 Atl. 255. In that case a party who had acted as superintendent of a stone quarry brought an action to recover his salary, and obtained judgment therefor, which was paid by the defendant. Thereafter he brought a second suit to recover for board furnished, supplies bought, and money paid while acting as superintendent of the company; and it was contended in that case that the first judgment was a bar to the second suit, but this contention was held untenable by the supreme court of Pennsylvania. That court, in its opinion, says: “If the contract was as he testified—that defendants agreed to pay him one hundred dollars per month for his services of superintendent of their quarry—he had an undoubted right to bring suit for that, as a distinct and independent claim, ⁵⁶⁹ which had no necessary connection with either of the items of claim embraced in this suit. He was not bound, under penalty of forfeiting his right to the latter items,

to include them in his suit for services as superintendent. Authority for so plain a proposition as that is unnecessary. The transcript of the justice before whom that suit was brought clearly shows that plaintiff's claim was for services at defendant's stone quarry, 'two months and twenty days, at one hundred dollars per month, amounting to two hundred and sixty-six dollars.'” The distinction, therefore, would seem to be that in a second action upon the same claim or demand the former judgment, if rendered upon the merits, constitutes an absolute bar to the second action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses which might have been made, but were not, never existed: *Howard v. Huron*, 6 S. Dak. 180, 60 N. W. 803; *Manufacturing Co. v. Schaack*, 10 S. Dak. 511, 74 N. W. 445. But, when the second action between the parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to matters in issue or controverted, upon the determination of which the findings or verdict was rendered. It is not enough even that it appears that the issue presented in the latter suit was presented and ought to have been litigated in the former, but it must appear further that it was litigated and decided, as well as involved.

The fact that in the former case there was a controversy between Oliver and Price as to a question of damages would ⁵⁷⁰ not, in our view of the case, affect the plaintiff in this case. That controversy was between the two defendants in the action, and the plaintiff could not, it seems to us, be concluded by that controversy. So far as the plaintiffs are concerned, they are only bound by the determination of the action upon the issues presented as between themselves and the defendant, Oliver. They cannot be concluded or bound by issues presented and litigated by Oliver and Price. Nor do we think that the fact that the plaintiffs received a part of the money arising from the sale of the mortgaged property should affect their rights in this action. As assignees of part of the notes and the chattel mortgage, they were entitled to a part of the money arising from such sale, and their receipt of a portion of the same does not necessarily make them parties to the litigation between Oliver and Price. No authority has been called to our attention, holding that a plaintiff is necessarily concluded by

the result of litigation between codefendants, and we are unable to discover any reason why they should be so concluded. Ordinarily, a plaintiff is bound only by a judgment directly between himself and the adverse party, and we can see no reason for extending the rule so as to conclude a party by a judgment between codefendants, in which litigation he takes no active part. Our conclusion is, therefore, that the court erred in refusing to strike out the paragraphs referred to, and the order of the court denying the motion is reversed.

Haney, J., took no part in the decision.

RES JUDICATA.—A JUDGMENT is final, not only as to the subject matter, but also as to every other matter which the parties might have litigated and had decided: *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91, 26 Pac. 701; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599; monographic note to *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 570. Compare *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 84, 35 Atl. 766; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493.

RES JUDICATA.—IF ONE OF TWO DEFENDANTS makes an issue with the plaintiff, a judgment settling the issue so made in favor of the defendant does not determine the question between the codefendants: *Jones v. Vert*, 121 Ind. 140, 16 Am. St. Rep. 379, 22 N. E. 882; *Handley v. Jackson*, 31 Or. 552, 65 Am. St. Rep. 839, 50 Pac. 915; but what is adjudicated between defendants has the same effect between them as *res judicata* as if they appeared in the action as plaintiff and defendant: *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384, 18 N. E. 123.

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CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

STATE v. BRIDGES.
[22 Wash. 64, 60 Pac. 60.]

PUBLIC LANDS—VESTED RIGHTS OF APPLICANT.—An applicant for state tide lands who has complied with all preliminary requirements of the existing law entitling him to a contract of purchase has a vested right in such land and to such contract, of which he cannot be deprived, notwithstanding the repeal of the statute under which his application was made.

A. Weir, for the relator.

T. M. Vance, for the respondent.

64 REAVIS, J. This is an application by the relator for a writ of mandate to require the commissioner of public lands to issue a contract to relator conveying to him certain lands described in the petition. The material facts are that the relator, on January 7, 1897, filed his application to purchase the tide lands described in the petition; that the application was in due form, and accompanied by a certified transcript of the field-notes of survey of the meander line, and showed that the relator was entitled to own and hold lands in this state; and that the relator, at the time of filing, deposited with the commissioner one-tenth of the purchase price of the tide lands described, pursuant to sections 70, 71, pages 557, 558, of the Laws of 1895. The notice of application to purchase was duly published as required by law, and, the publication thereof having been completed on the twelfth day of March, 1897, the proof of publication **65** was filed on March 25, 1897. When the application was filed, and thereafter, until March 16, 1897, no

preference rights of purchase existed to tide lands of the class involved herein. On the sixteenth day of May, 1897, the relator filed with the commissioner a demand that the contract of purchase should be issued to him, offering to do everything necessary and required to be done in connection therewith. On the sixteenth day of March, 1897, the act of March 16, 1897, went into effect, repealing the law of 1895, under which the relator's application to purchase was made, and reviving certain preference rights of purchase. Thereafter on June 23, 1897, an application was filed by one Calhoun to purchase the land involved, under the new law.

Upon these facts the only issue that seems to rise is, Was it competent for the state, on March 16, 1897, to withdraw the lands in controversy from the disposition under the law of 1895, and make some other disposition of the same? In other words, were the relator's rights sufficiently vested before the law of March 16, 1897 (Laws 1897, p. 229), went into effect to entitle him to the contract authorized in the law of 1895? The relator has called the attention of the court to the following authorities: *Lytle v. Arkansas*, 9 How. 314; *Stark v. Starrs*, 6 Wall. 402; *Barney v. Dolph*, 97 U. S. 652; *Hutchings v. Low*, 15 Wall. 77; *Wirth v. Branson*, 98 U. S. 118. In the latter case the court said: "The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated or set aside."

⁶⁶ In *Dash v. Van Kleeck*, 7 Johns. 503, 5 Am. Dec. 291, it was observed that "the statute ought never be construed so as to defeat a suit or conveyance upon a right already vested."

It is maintained by counsel for respondent that the acts performed by relator, under the law of 1895, were preliminary to the right of the issue of the contract, and that the money, the one-tenth of the purchase price required under the act of 1895, was merely a deposit, and not an element of the contract, and that the relator's rights to make the purchase had not vested: *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971; *Frisbie v. Whitney*, 9 Wall. 187; *Hutchings v. Low*, 15 Wall. 77; *Campbell v. Wade*, 132 U. S. 35, 10 Sup. Ct. Rep. 9, are cited in support of the re-

spondent's contention. It has been frequently determined by the supreme court of the United States, in the construction of the pre-emption law, that the acts performed by the pre-emption claimant, when accompanied by the payment of the purchase price, vested claimant's rights and he was entitled to the issuance of a patent. It is true that some of the acts required to be done under the pre-emption law were not required to be done under the act of the legislature of 1895, but the relator was a qualified purchaser; he made application to purchase under the existing law, and performed every act required by law to entitle him to a contract of purchase which would ultimately convey to him the title. These acts were completed before the repeal of the act of 1895 by the law of March 16, 1897.

The real question is, Was it the duty of the commissioner to execute the contract of purchase when all these acts in conformity to the statute had been done? We think this question must be answered in the affirmative. If so, the intervention of the repealing statute could not change that duty and could not impair the obligation to ⁶⁷ issue the contract. The case may be distinguished from that of *Campbell v. Wade*, 132 U. S. 35, 10 Sup. Ct. Rep. 9, because in that case all the preliminary steps required by the law had not been complied with before the land had been withdrawn. We do not think the case of *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, affects the conclusion announced here.

The writ will issue.

Gordon, C. J., and Dunbar, J., concur.

PUBLIC LANDS—TITLE OF INDIVIDUAL.—When public lands have been thrown open to private acquisition, one who complies with all the requisites to entitle him to a patent for any particular tract is regarded as the equitable owner thereof: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 480. The holder of a certificate of purchase of state land, who has fully paid the purchase price thereof, has a vested right to a patent sufficient to support an action to quiet title against a subsequent patentee from the state: *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295.

EISENBERG v. NICHOLS.

[22 Wash. 70, 60 Pac. 124.]

CONDITIONAL SALES—GOODS SENT UNDER MEMORANDUM CONTRACT.—The custom prevailing among jewelers whereby jewelry is sent by wholesalers to retailers under a "memorandum" contract, to remain the property of the wholesaler, and to be paid for only after sale by the retailer, or if not so sold, to be returned, constitutes a conditional sale, and not a bailment; and an innocent and bona fide purchaser from the retailer is within the protection of a statute providing that all conditional sales of property, where the property is placed in the possession of the vendee, shall be absolute as to all creditors or purchasers in good faith, unless within ten days of the taking of possession by the vendee a memorandum of the condition of the sale, signed by both parties, shall be filed in the auditor's office of the county wherein the vendee resides.

S. R. Stern, for the appellant.

R. E. Porterfield and T. D. Rockwell, for the respondent.

71 DUNBAR, J. This is an action in replevin to recover certain jewelry bought of the appellant by the respondent Nichols, and afterward sold by him to the respondent Rogers. Upon the close of appellant's testimony the respondents challenged the sufficiency of the same on a motion to dismiss, and the motion was granted by the court. Judgment was entered for costs, and from such judgment this appeal is taken.

It is the contention of the appellant that the circumstances under which these goods were purchased show that it was a bailment, instead of a conditional sale, and that the title never passed from the appellant. This contention is based upon the custom which is alleged to exist among jewelers where a jeweler procures from a jobbing or wholesale house lines of goods on selection or memorandum; and that these two words "selection" and "memorandum" have a distinct trade significance, and their meaning as understood in the trade, and, it is alleged in this case, was understood by Nichols, is that goods can be ordered from which selection can be made, and that all can be kept, or a portion, or none, and, if any are selected and kept by the jeweler, he has either to agree upon the terms of the sale, or pay cash for the property kept; that the title of the goods thus sent remains in the sender until paid for, or until it is agreed what credit will be given, which credit is evidenced by bills showing the terms. The goods in question were obtained under this memorandum contract, and were marked "memo-

randum" or "memoranda," which it is alleged and shown mean the same thing.

It is asserted by the appellant that the principle involved ⁷² in this case was decided in favor of their contention in *Rumpf v. Barto*, 10 Wash. 382, 38 Pac. 1129; but that case, it seems to us, can easily be distinguished from the case at bar. There the goods were sent to the purchaser under the following contract: "These goods are sent for your inspection, the property of Rumpf and Mayer, and to be returned to them within 'demand' (in writing) days. Sale only takes effect from date of their approval of your selection, and until then goods are to be held subject to their order." (Description.)

In that case Reichart had no customer, but made arrangements with one Mayberry by which the latter was to sell or pawn the goods for not less than four hundred dollars, which sum was to be paid Reichart, and they were to divide the proceeds above that sum. Mayberry pawned them to Barto for two hundred and fifty dollars, and ran away with the whole sum, he knowing that the goods did not belong to Reichart. The claim of Barto in that case was that he bought the goods from Mayberry, he at the time being the apparent owner; and this court said that Mayberry was simply a thief and had obtained wrongful possession of the goods, and, of course, under such circumstances, could confer no title upon his vendee by conditional sale or otherwise. *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470, was a case where the vendors made a contract with the vendee that they would deliver to him certain goods to be put into his shop for sale, but that the property in them should not pass to the vendee until the price was paid. The goods were sold without having been paid for, and an action was brought for their recovery, and it was held in that case by the supreme court of Massachusetts that the vendor could recover, but it was upon the ground that it was a conditional sale; and the court deplores the necessity of the decision in the following words: ⁷³ "The whole doctrine of conditional sales, where the possession is in the vendee and he is apparently the owner, is one rendering purchasers less secure of acquiring a good indefeasible title; but it is well settled, and the purchaser in the present case from Knights takes the usual risk of the right of his vendor to sell this property."

It is insisted by the appellant that this case is decisive of the case at bar, but, as we have observed, the right of the vendor to recover in this case was based upon the theory of a condi-

tional sale; and conditional sales under our statute (Ballinger's Code, sec. 4585) will not protect the vendor unless his contract is filed in the auditor's office. The statute is as follows: "All conditional sales of personal property or leases thereof containing a conditional right to purchase where the property is placed in the possession of the vendee shall be absolute as to all creditors, or purchasers in good faith, unless within ten days of the taking of possession by the vendee a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein, at the date of the vendee's taking possession of the property, the vendee resides."

So, instead of *Burbank v. Crooker*, 7 Gray, 158, 66 Am. Dec. 470, being a case in favor of appellant's contention, it seems to us to sustain exactly the opposite doctrine, viz., that the contract in question is a conditional sale.

The testimony in this case shows that the transaction falls within the words and spirit of the statute. It was a contract containing, in the language of the statute, "a conditional right to purchase where the property is placed in the possession of the vendee"; and the evidence in this case not only showed that Nichols had a right to purchase this stock, but that he also had a right to sell the same. The testimony of Mr. Riordan, on page 15 of the record, on cross-examination, was as follows:

⁷⁴ "Q. When goods are sent on memorandum, with the ownership as stated by you, you have a right to sell any of them or all? A. Yes, sir; you have a right to sell them.

"Q. To anybody? A. Yes, sir; to anybody."

It is true that on redirect examination in answer to the question, "But you have got to pay for them in cash?" the witness answered "Yes," but, notwithstanding this, the sale was warranted before the cash was to be paid. This must be true if the witness stated the truth that, when goods were sent on memorandum, the party receiving them had a right to sell them, for on recross-examination the following testimony was elicited:

"Q. You do not pay for goods spot down when you sell to somebody else when they are on memorandum? A. The house has got to send you a bill.

"Q. Yes, and in the meantime you have a right to sell any of those goods, either on cash or on time? A. Yes, sir.

"Redirect—

"Q. Provided you pay for them? A. Yes, sir.

“Recross—

“Q. But you have a right to sell them out to anybody at any time, on any terms? A. Yes, sir.”

It is conclusive from the testimony that the purchaser of these goods had a right to sell them before he paid for them. Mr. Doerr testified, on page 16 of the record, that when he sold an article it was reported to the house, and they sent him a regular bill of the same, telling the amount, etc. It is true that this witness stated as a conclusion that the ownership remained in the vendor until the goods were paid for; but that was a question of law upon which he was not qualified to testify. Surely, the testimony in this case brings it within the provisions of ⁷⁵ the statute and removes it from that character of cases where goods were sent for the purpose of selection, without any right of disposal until it is determined between the vendor and the vendee what goods are selected and what are to be returned. Indeed, the appellant, in his reply brief, admits, in answering the argument of respondents' counsel, that, according to his own statement, a sale would be justified, by the following statement: “But, says respondent, if the dealer is obliged to pay for goods before he can transfer title, how is he benefited by the custom? He is benefited as Nichols thought he was being benefited. He told Mr. Marx he had a customer for a three-carat stone, and for certain turquoise and diamond rings. He could show the stones or the rings to the customers; if they suited, and he made a sale, he pocketed his profit and paid for the property, and thus avoided carrying the goods in stock, and taking a chance of selling them and paying for them whether he sold them or not.”

The whole testimony shows that counsel for appellant was justified in making this statement, for it shows that Nichols had a right to make the sales and pay for the goods afterward; and, if he did have such right, the case falls squarely within the statute.

Pratt v. Burhans, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064, is another case of conditional sale, and is not in point, because it does not appear that any statute providing for the filing and recording of conditional sales was in existence in the state of Michigan at the time that decision was rendered.

Appellant relies largely upon, and quotes extensively from Smith v. Clews, 114 N. Y. 190, 11 Am. St. Rep. 627, 21 N. E. 160. In that case one Plumb, who was a diamond broker, introduced to Smith (plaintiff in the case) one Elijah Miers, tell-

ing Smith that Miers thought that, if he saw a pair of diamond earknobs ⁷⁶ that suited him, he could sell them to Clews. They were not paid for, and in time the plaintiffs demanded the diamonds from Miers and from Clews, and an action was brought to recover their possession. In that case the bills were sent marked "On approval," and, as in this case, it was shown that it was understood among jewelers that, where goods were marked in this manner, there was no power conferred to sell, but authority merely to show the diamonds to a customer and report to the owner; and it did not, under the circumstances, make any difference whether the purchaser, Clews, understood the contract between his vendor and the plaintiff or not, but that he was bound by the authority of his vendor to sell, and was bound by such limitations as the owner had placed upon Miers' possession, and, unless authority to sell existed, Clews, although acting in good faith, obtained no title to the stones; but it will be seen from the following excerpt from the opinion in that case that, if the same state of facts had existed there as exist here, Clews would have been protected in his purchase. The court said:

"On the former appeal of this case the court construed the contract, in the light of the evidence then before it, to confer on Miers a power of sale, and if the same evidence was now before us we should feel constrained to follow that decision. It then appeared that plaintiffs, prior to the transaction in question, knew Miers to be a dealer in diamonds, and that the stones which on two former occasions he had sold to Clews had been obtained from plaintiffs through Plumb, who was their agent. The court emphasized these facts, saying: 'The plaintiffs were dealers in diamonds, and they knew Miers, and that he was engaged in the business of a diamond dealer. They had, on two former occasions, intrusted, through their agent, diamonds to Miers, who had sold them, and accounted for the proceeds of the sale without any fault being found, so far as appears, on account of any lack of authority to sell. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take ⁷⁷ these diamonds, and show them to the customer, and, if approved of by the customer, sell them to him? It can mean nothing else than an authority to sell the stones to the customer if they met his approval.' These facts do not appear in the case presented to us."

It will be observed that the facts quoted by the court as sustaining the right of Clews to the possession of these goods,

were identical in principle with the facts shown in this case, and, in addition to this, it does not appear that the statute in relation to the filing of conditional sales existed in the state of New York. An examination of all the other cases cited by appellant shows that they are not applicable under our statute. There is no question but that, if these statutes to which we have referred had not been enacted, it would have been claimed—and justly claimed—that this transaction was a conditional sale, and the appellant would have urged in his behalf the authorities pronouncing such a transaction a conditional sale. This statute was enacted for the purpose of preventing hardships to innocent purchasers, which became notoriously common under the established law in relation to conditional sales, and we are not inclined to destroy its efficacy by a construction which would be a practical annulment of the law by pronouncing that a bailment which, before the enactment of the statute, would have been conceded under the authorities to have been a conditional sale.

It not appearing that any fraud was committed by Rogers in the purchase of these goods, and there being no testimony to show that he was not a bona fide purchaser, there was nothing for the jury to determine, and the court properly dismissed the action.

The judgment is affirmed.

Fullerton and Reavis, JJ., concur.

GORDON, C. J. I think there was sufficient conflict in the evidence to have required the submission of the case to the jury.

⁷⁸ Section 4585 of Ballinger's Code only makes a conditional sale absolute as to creditors or purchasers in good faith, and, in my opinion, there were many circumstances surrounding the sale from respondent Nichols to respondent Rogers tending to show that the latter was not a "purchaser in good faith." I think the court erred in taking the case from the jury.

SALE BY ONE WITHOUT TITLE.—One who sells goods with knowledge that they are to be put on sale is estopped, as against an innocent purchaser, from claiming that the sale was conditional and that the title had not passed: *Lewenberg v. Hayes*, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. 469. Compare *Smith v. Clews*, 114 N. Y. 190, 11 Am. St. Rep. 627, 21 N. E. 160.

WILLEY v. WILLEY.

[22 Wash. 115, 60 Pac. 145.]

MARRIAGE AND DIVORCE—PROHIBITION ON REMARRIAGE—MARRIAGE IN ANOTHER STATE.—A statute merely prohibiting the remarriage of either party within a certain time after a decree of divorce is rendered has no extraterritorial effect. If one of the parties marries in another state within the prohibited period, and such marriage is valid under the laws of that state, it must be held valid in the state where the divorce was granted.

G. C. Israel, for the appellant.

Troy & Falknor, for the respondent.

115 REAVIS, J. This appeal is from an order of the superior court granting suit money and attorneys' fees to plaintiff in an action for divorce. Appellant raises objection to the order made on the ground that the facts stated in the complaint for divorce, and the affidavits presented by the plaintiff upon the hearing of the order, and the admissions made by the plaintiff in her reply, taken together, negative the fact of a marriage between the plaintiff and the appellant, and, when such fact appears wanting upon the face of the record, the order granting suit money and attorneys' fees cannot be made. In the complaint a duly solemnized marriage was alleged to have taken place at Santa Rosa, California, on the sixth day of February, 1888. Defendant, answering, alleges that on **116** the sixth day of February, 1888, the date of the alleged marriage, he had a living and undivorced wife residing in the then territory of Washington; that on the eighth day of June, 1888, defendant's said wife procured a divorce from him in the district court of Thurston county, Washington, but that the decree did not become absolute until the 8th of December following. When the answer was filed the plaintiff prayed leave to amend her complaint, and it was amended by alleging that, after the marriage between herself and the defendant was solemnized, they continued to live in Santa Rosa, California, until July 4, 1888, and during all of said time desired to be, and agreed to be, and lived together and cohabited as, husband and wife, and on July 4, 1888, they removed to this state and have since continued to reside here, living and cohabiting together as husband and wife, until the commencement of this suit.

The divorce act in force in this state at the time of the solemnization of the marriage in California was section 2008 of

the code of 1881, as follows: "Whenever judgment for divorce from the bonds of matrimony is granted by the court, in this territory, the court shall order a full and complete dissolution of the marriage as to both parties; provided, that neither party shall be capable of contracting marriage with a third person, until the period in which an appeal may be taken, under the provisions of the civil practice act, has expired; and in case an appeal is taken then neither party shall intermarry with a third person until the cause has been fully determined."

Counsel for appellant contends that defendant was incapable of contracting marriage until the period of six months, which is the time prescribed in the practice act as the time within which the appeal must be perfected, had elapsed. At the time that the formal solemnization of the marriage took place in Santa Rosa, the defendant then had ¹¹⁷ living in Washington territory an undivorced wife, but at that time both plaintiff and defendant were citizens of California. The plaintiff had no knowledge of any incapacity of the defendant to contract marriage. It is apparent that the ceremony of marriage which occurred on the 6th of February, 1888, between the plaintiff and defendant was void at the time; but the allegations are that thereafter they continued to live together as husband and wife, and assumed the matrimonial relations, and were held out as such where they then resided until the 4th of July following, when they removed to this state. The facts alleged show the validity of the marriage under the laws of California after the divorce was granted to the former wife of the defendant: 2 Deering's Cal. Civ. Code, secs. 55, 57, 68; *Graham v. Bennet*, 2 Cal. 503; 1 Bishop on Marriage, Divorce and Separation, secs. 345, 970.

The general rule is that the *lex loci contractus* is controlling in adjudications involving the validity of marriage: See Story on Conflict of Laws, 8th ed., sec. 113. This is cited with approval in *In re Wilbur's Estate*, 8 Wash. 35, 37, 40 Am. St. Rep. 886, 35 Pac. 407.

Counsel for defendant maintains that the decree of divorce of the district court of Thurston county, entered on the 8th of June, 1888, was not absolute until six months thereafter. This involves the construction of section 2008 of the code, *supra*. It will be observed that the code declares that a full and complete absolution of the marriage as to both parties is decreed, but the proviso makes them incapable of contracting marriage with a

third party until the time has elapsed in which an appeal may be taken.

In the case of *Moors v. Moors*, 121 Mass. 232, cited by counsel, the statute required that notice should be given to the defendant to show cause why an absolute decree should not be granted, and the court might or might not make the decree absolute on the final hearing. Likewise, ¹¹⁸ in the English case of *Wickham v. Wickham*, 6 Prob. Div. 11, the finality of the decree was after the absolute order was made. Evidently the law of 1881 directs a final decree ordering a full and complete dissolution of the marriage as to both parties, and is distinguishable from the decree nisi mentioned in the case cited.

Counsel seems to rely on *Warter v. Warter* (1890), L. R. 15 P. D. 152. That was a case arising under the Indian divorce act of 1869, Act No. 4, which contained the following provision: "When six months after the date of any decree of the high court dissolving a marriage have expired, and no appeal has been presented against such decree to the high court in its appellate jurisdiction, but not sooner, it shall be lawful for the respective parties to the marriage to marry again."

And there, also, the procedure was that the decree nisi was pronounced, and six months thereafter such decree might be made absolute. There the plaintiff, Tayloe, being a resident of India, instituted proceedings for the absolution of his marriage on the ground of his wife's adultery with Colonel Warter, and the decree nisi was pronounced on May 19, 1879, which decree was made absolute November 27, 1879; but pending the action, which was undefended, Mrs. Tayloe went to England and was immediately followed by Colonel Warter, and within less than three months they were married. Colonel Warter was the correspondent in the divorce suit. The court said Mrs. Tayloe was subject to the Indian law of divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under the law. This could not be done, as the Indian law, like our own (English), does not completely dissolve the tie of marriage until the lapse of the specified time after ¹¹⁹ the decree; and the court draws a distinction between this and cases where the incapacity to remarry is only attached to the guilty party, and observes that the latter are penal. It will be observed that here both husband and wife were residents of India, and Colonel Warter was a correspondent and party before the court, and that the guilty de-

fendant and corespondent evidently left their residence in India to be married, in defiance of the Indian prohibition, in England. In the case at bar both plaintiff and defendant were residents of the state of California, and the plaintiff was entirely without knowledge of the prohibition contained in the statute of 1881. Under the law of California (2 Deering's Cal. Civ. Code, sec. 91), the effect of a judgment decreeing a divorce is to restore the parties to the status of unmarried persons: *Barber v. Barber*, 16 Cal. 378. There was evidently no impediment to a common-law marriage under the laws of California at the time that plaintiff and defendant consented to be husband and wife. It seems to have been generally considered by the courts of this country that similar prohibitions as existed in the statute against the parties remarrying within six months after the decree of divorce have no effect beyond the jurisdiction of the state.

Nelson on Divorce and Separation, volume 2, section 588, observes: "The marriage is completely dissolved by a decree of divorce, and all the obligations created by that relation are discharged, and the parties stand as though no such relation had existed. The marriage relation is as completely dissolved by divorce as by death. Therefore, on the entry of a decree of divorce, both parties are entitled to marry again. . . . Generally, the remarriage is prohibited within a specified period; as, five years. . . . The authorities are almost uniform that such statutes, being penal, have no extraterritorial operation, and unless there is an express provision making a marriage entered ¹²⁰ into in another state void, the guilty party may contract a valid marriage in another state, even though both parties are residents of the state where the decree was rendered, and went out of the state to evade the laws": *Dickson v. Dickson*, 1 Yerg. 110, 24 Am. Dec. 444; *Fuller v. Fuller*, 40 Ala. 301; *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768, 3 South. 321; *Van Storch v. Griffin*, 71 Pa. St. 240.

This view was also intimated by this court in *Wilbur's Estate*, 8 Wash. 35, 38, 40 Am. St. Rep. 886, 35 Pac. 407; and without further distinguishing the case of *Smith's Estate*, 4 Wash. 702, 30 Pac. 1059, cited by counsel for defendant, it may be said that in that case the parties were all residents of this state, and the marriage solemnized in the face of the prohibition of the statute then in force.

We do not think the prohibitions of the code of 1881 were in effect beyond the jurisdiction of the state or territory, and,

upon the face of the record presented, the validity of the marriage is shown. The amount allowed as suit money and attorneys' fees is peculiarly within the discretion of the superior court, and it does not appear that there was any abuse of that discretion in the order made.

The order is affirmed.

Dunbar and Fullerton, JJ., concur.

GORDON, C. J. I think this case falls squarely within the decision of this court in *Smith's Estate*, 4 Wash. 702, 30 Pac. 1059, in which it was held that a decree of divorce "cannot be held to be full and complete until the time mentioned in the provision (six months) has expired." That case decided squarely that the statutory restriction against marrying within the prohibited period was a limitation upon the decree of divorce, and rendered it inoperative during the period mentioned. The unmistakable logic of that case is that the former ¹²¹ marriage is not dissolved until six months after the entry of the decree. If that be true, then it is immaterial whether the subsequent marriage within that period occurs within or without the state; the fact remains that the former marriage is not dissolved. I am convinced that the decision in that case is opposed to the great weight of authority upon the question. It ought, however, to be met squarely, and either sustained or overruled. If sustained, the order in the present case should be reversed.

The statute contains no expressed words of nullity, and marriages contracted in violation of it are not void; they are voidable, if the appeal be taken within the period prescribed.

The right to marry does not spring from the statute, but existed prior to its enactment, and unlawful marriages are not void unless expressly declared to be so: *Park v. Barron*, 20 Ga. 702, 65 Am. Dec. 641, and authorities there cited. See, also, *Mason v. Mason*, 101 Ind. 25.

I think the doctrine of the *Smith* case should be overruled, and I concur in affirming the order appealed from.

STATUTES PROHIBITING MARRIAGE AFTER DIVORCE are not extraterritorial in their effect, unless made so by express words or necessary implication: *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 75. Compare *McLennan v. McLennan*, 31 Or. 480, 65 Am. St. Rep. 835, 50 Pac. 802; and see the monographic note to *State v. Shattuck*, 60 Am. St. Rep. 941-947.

PRESTON-PARTON MILLING COMPANY v. DEXTER
HORTON & CO.

[22 Wash. 236, 60 Pac. 412.]

FRAUDULENT CONVEYANCES—SUBSEQUENT JUDGMENT LIEN.—As between the parties thereto, a fraudulent conveyance is absolute and good against the grantor, and no interest, legal or equitable, remains in him, upon which the lien of a judgment subsequently acquired can attach.

FRAUDULENT CONVEYANCES—RIGHTS OF JUDGMENT CREDITORS.—A judgment creditor who has had a conveyance by his judgment debtor set aside in equity as fraudulent against himself, obtaining a decree subjecting the property to sale under his judgment, and bidding it in at such sale, thereby obtains a title superior to that of a prior judgment creditor, who treats the fraudulent conveyance as void, and bids in the property at execution sale under his prior judgment.

FRAUDULENT CONVEYANCES — MORTGAGE BY FRAUDULENT GRANTEE—RIGHT OF CREDITOR TO REDEEM.—If lands fraudulently conveyed are mortgaged by the fraudulent grantee, and then sold under foreclosure, a judgment creditor of the fraudulent grantor who, without having such conveyance annulled, has sold and purchased the property under execution upon his judgment, is not entitled to redeem from such foreclosure, as he is not a successor in interest nor a judgment creditor of the mortgagor.

INJUNCTION AGAINST REDEMPTION PROCEEDINGS.—A party interested is entitled to an injunction against proceedings to redeem property from a foreclosure sale when it appears that if such proceedings are allowed to continue he will be compelled to part with an incident to his title to one who has shown no right to obtain it.

E. F. Blaine, for the appellant.

Allen & Allen, for the respondent.

237 REAVIS, J. Suit to enjoin the redemption of real property in Seattle. The plaintiff filed its complaint in the superior court of King county, stating substantially the following facts: That on January 11, 1896, the defendant Dexter Horton & Co. recovered a judgment against W. A. Harrington and wife; that on March 19, 1896, the McDougall & Southwick Company recovered a judgment against W. A. Harrington and wife; that on April 22, 1896, the plaintiff milling company recovered a judgment against ²³⁸ the same defendants; that theretofore, on March 14, 1893, Harrington and wife had executed a deed to John H. Middleton of certain described real estate in Seattle; that on the 14th of November, 1895, Middleton and wife mortgaged the same property to one Griswold; that on the twenty-fourth day of April, 1896, the McDougall & Southwick Com-

pany and the plaintiff milling company commenced a joint action, but not for all creditors, against Harrington and wife and Middleton and wife, to have the deed declared fraudulent and void and set aside, and the said property subjected to the lien of their judgment only, and, when the action was commenced, filed notice of lis pendens; that on the 28th of April, 1896, the defendant, Dexter Horton & Co., caused an execution to issue and be levied, and on the 29th of May, 1896, all the right, title, and interest of the Harringtons in and to the property was sold by the sheriff, and purchased by the appellant, and a sheriff's deed was executed to it; that in April, 1897, in the joint action of the McDougall & Southwick Company and the milling company, judgment was entered in their favor, setting aside the deed from the Harringtons to Middleton and declaring it fraudulent, and the property was sold under the decree entered in said action, and the sale was thereupon confirmed; that on the twenty-first day of December, 1898, the sheriff executed a deed to the joint judgment creditors for the property purchased by them, and thereafter the McDougall & Southwick Company quitclaimed its interest in the property to the Preston-Parton Milling Company, plaintiff; that on August 28, 1897, Griswold commenced a suit to foreclose his mortgage on the property against Middleton and wife, and the McDougall & Southwick Company, and plaintiff and appellant herein, and recovered judgment, and the premises were sold under a decree of foreclosure, and the sale was confirmed, and thereafter Griswold received a certificate of purchase from the sheriff and assigned the same to the ²³⁹ plaintiff milling company; that on the fourth day of January, 1899, the appellant gave notice that it would redeem the property from the sale made under the Griswold foreclosure; that the sheriff will, unless restrained, issue a certificate of redemption therefor to appellant, and appellant is not entitled to redeem the property, and has no right to demand a redemption, as it is not the successor in interest of said Middleton and is not a subsequent encumbrancer and has no rights in the property as against the plaintiff.

A general demurrer was interposed to the complaint by the defendants, which was overruled, and only Dexter Horton & Co. appealed.

1. The main question presented here is the right of the appellant to redeem the property in controversy. The appellant obtained the prior judgment against Harrington and wife, but that judgment was not a lien upon the premises conveyed by

Harrington and wife to Middleton: *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101. In that case it appears that on July 21, 1892, the community of Weymouth and wife was the owner of real property and Weymouth conveyed the same to his wife. In June, in the following year, a judgment was rendered against Weymouth in favor of a bank upon a note executed by Weymouth in April, 1890—the note being a community debt—and a transcript of the judgment was duly filed in the auditor's office. After the filing of the transcript of the judgment, in December, 1893, the wife, with Weymouth, her husband, joining her, conveyed a part of the real property mentioned to one De Lanty, and the remainder to Strong—two prior creditors. Thereupon an action was commenced by the receiver of the bank to set aside the conveyances to De Lanty and Strong. The judgment went against the plaintiff. The court observed: "The conveyance from Andrew to Margaret E. Weymouth was in form legally sufficient to pass all of the title ²⁴⁰ and interest of the husband to the lands in question. As between the parties the conveyance was absolute and good as against the grantor, and no interest, legal or equitable, remained in the grantor upon which a lien of a judgment subsequently rendered could attach."

And, concluding, the court said: "At the date of the entry of the judgment in favor of the bank, and the filing of the transcript, the legal title to the premises in question was in Margaret E. Weymouth and not in the judgment debtor. Hence, no lien attached to the land as a consequence of said judgment or of the filing of the transcript, and the subsequent conveyances by the respondent Margaret E. Weymouth and her husband to De Lanty and Strong, for value, prior to any proceedings taken by said judgment creditor attacking the transfer from the husband to the wife, were sufficient and must be upheld."

This case was followed and given effect in *United States v. Eisenbeis*, 88 Fed. 4. The statute referring to judgment liens is section 5132 of Ballinger's Code: "The real estate of any judgment debtor, and such as he may acquire, shall be held and bound to satisfy any judgment."

2. But the most important contention of counsel for appellant is upon the effect of the levy and sale under the execution issued in favor of appellant's prior judgment against Harrington and wife. It is maintained that the creditor has a right to treat the fraudulent conveyance as void, and the judgment

creditor may sell the land under execution upon his judgment, and the purchaser may impeach the conveyance of the land; that the sale under an execution of land fraudulently conveyed passes the legal title to the purchaser, and the conveyance to the fraudulent grantee is but a cloud upon it. A number of authorities are cited, among which are *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Hagar v. Shindler*, 29 Cal. 48; *Thomason* ²⁴¹ *v. Neeley*, 50 Miss. 310; *Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707; *Taylor v. Branscombe*, 74 Iowa, 534, 38 N. W. 400; *Wait on Fraudulent Conveyances*, 3d ed., 209, and others of like import.

3. The case of *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, seems to be relied upon for right to sell, where property is conveyed in fraud of creditors, upon execution against the fraudulent grantor. A careful examination of this case shows that it was an action by the judgment creditor to set aside a fraudulent conveyance which was alleged to be a cloud upon plaintiff's title. The plaintiff was a creditor and had, under execution, purchased the property. The real question in the case seemed to be that the judgment creditor had a right to maintain his action to set aside the fraudulent conveyance after he had enforced his execution under his judgment; that it was not then too late for him to maintain his action. The suit was between the judgment creditor and the fraudulent grantor and grantee. But it was also held in that case that the complaint did not state facts sufficient to constitute a cause of action, when it failed to allege that there was no other property of the judgment creditor at the time of the conveyance, out of which the creditor could satisfy his judgment. The decision of the case, upon the facts stated, is not inconsistent with the determination in *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101.

Wait on Fraudulent Conveyances, third edition, section 392, observes: "The commencement of a creditor's suit in chancery by a judgment creditor . . . gives him a lien upon all the equitable assets of the debtor. . . . The first party to move is rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of his debtor, and entitles him to ²⁴² a priority, unless he elects to bring the action for the benefit of himself and others similarly situated." And the authorities collated appear to support the text of the author: *Bridgman v. McKissick*, 15 Iowa, 260;

Roberts v. Albany etc. R. R. Co., 25 Barb. 662; Storm v. Waddell, 2 Sand. Ch. 494.

The plaintiff and its assignor, as judgment creditors prior to the levy under judgment of appellant upon the property of Harrington and wife, instituted a suit in equity (and filed notice of lis pendens at the time) to set aside the deed from Harrington and wife to Middleton as fraudulent against themselves as creditors. Judgment was given to the plaintiffs, declaring the deed void as against them and subjecting the property to their judgment and a decree of sale thereunder. Title derived by them under this sale would seem to be superior to any right obtained by appellant under its execution and sale of the property of Harrington and wife. Upon the facts here, it is not a necessary implication that the conveyance from the Harringtons to Middleton was fraudulent as against appellant. *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, did not go so far as to declare a conveyance fraudulent unless it was shown, in addition to the fraudulent intention of the judgment debtor and his grantee, that the judgment debtor also was not possessed of other property to satisfy the judgment. It would seem to follow necessarily that a conveyance of title valid in form and of record is not absolutely void, but in law the legal title passes, and must be divested finally by some appropriate adjudication. In that case the judgment creditor proceeded with the suit to declare the deed fraudulent, which was the action before the court. The appellant, as judgment creditor, has not proceeded any further than to levy and sell under his execution against Harrington and wife, and several years have elapsed. The plaintiff holds a certificate of purchase issued under a valid foreclosure ²⁴³ of Griswold against Middleton. It cannot be said that appellant is a successor in interest or creditor of Middleton. Upon the facts, appellant seems to have no right of redemption here, as such redemption, if now made, would ripen into a title in appellant, and would become a cloud upon the title claimed by plaintiff under the sale upon the decree issued in the suit to set aside the fraudulent deed. The injury to the plaintiff requiring injunctive relief is that the plaintiff would be compelled to part with an incident of title, viz., the certificate of sale, and to one who has shown no right to obtain it.

The judgment is affirmed.

Gordon, C. J., and Dunbar and Fullerton, JJ., concur.

A FRAUDULENT CONVEYANCE IS VALID as between the parties: *Bradtfieldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, 40 Pac. 1; *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045.

FRAUDULENT CONVEYANCE—LIEN OF JUDGMENT.—A judgment debtor has no lien upon lands fraudulently conveyed by the debtor prior to the rendition of his judgment. Hence, a junior judgment creditor who first files his bill to set aside the fraudulent conveyance secures a first lien upon the property superior to that of any other judgment creditor: *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 77 Am. St. Rep. 116, 55 S. W. 137. Where creditors obtain judgments against a grantor subsequently to his conveyance, their filing bills to set it aside as fraudulent, and obtaining service thereon, create equitable liens on the land in the order in which the bills are filed and the service obtained: *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361. Compare *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 55 Pac. 980.

ADAMS v. DEMPSEY.

[22 Wash. 284, 60 Pac. 649.]

FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS OF GRANTEE.—If the good faith of a transfer or conveyance is attacked by creditors, the declarations of the grantor made after the execution of the conveyance, that it was made with intent to defraud creditors, are admissible in evidence.

FRAUDULENT CONVEYANCES—AMOUNT OF PROOF REQUIRED.—While proof of fraudulent intent in a conveyance in derogation of the rights of creditors must be clear and convincing, and such as to satisfy the minds of the jury to justify setting it aside, yet, in a given case, if the jury believe from a preponderance of the evidence that the transaction is fraudulent, that is sufficient.

FRAUDULENT CONVEYANCES—INTENT QUESTION OF FACT.—A conveyance in derogation of the rights of creditors cannot be declared fraudulent in law, unless it is necessarily so upon its face, otherwise the question of fraud must be left open to investigation as a question of fact, and the good faith of the parties or their intent, or the reasons underlying their conduct must be left for the consideration and determination of the jury.

W. J. Thayer, for the appellant.

Dawson & Huneke, for the respondent.

285 GORDON, C. J. The plaintiff in this action held a chattel mortgage upon a stock of goods owned and in the possession of his brother, doing business in Spokane. The defendant is sheriff of that county. The action was brought to recover damages because of wrongful attachment and sale of the goods covered by plaintiff's mortgage. The defense was

that the mortgage was in fraud of creditors of the mortgagor and consequently void. From a judgment in defendant's favor, plaintiff appealed.

We will not review the evidence. The appellant, among other alleged errors, complains that it was not sufficient to justify the verdict, while the respondent just as strenuously contends that the verdict is so manifestly just that it ought to stand, regardless of errors, if any there were, occurring at the trial. As we have concluded that a new trial must be awarded, we will notice only such questions as are likely to arise thereon. It was not error for the trial court to have admitted testimony as to the declaration made by the mortgagor after the mortgage was given. ²⁸⁶ The law in this jurisdiction was settled in *O'Hare v. Duckworth*, 4 Wash. 471, 30 Pac. 724. Nor was it error to refuse to charge the jury, as requested by appellant, that they would not be warranted in finding "plaintiff's mortgage to be fraudulent," even if they believed from a preponderance of the evidence "it was fraudulent; the evidence must go further; it should be clear and convincing"; otherwise, "your verdict should be for the plaintiff." It is sufficient to say that while proof of fraud must be clear and convincing, and such as to satisfy the minds of the jury, still, in a given case, if the jury "believe from a preponderance of the evidence" that a transaction is fraudulent, that is sufficient, and their verdict should reflect that belief.

Instruction 22 was as follows: "The jury are further instructed that if you find from the evidence that any considerable part of the proceeds of such property, after the execution of said mortgage and the taking possession of the property thereunder, were retained by said Harry C. Adams by and with the consent of the plaintiff, or that if, having received any considerable part of the proceeds, said plaintiff turned the same over to said Harry C. Adams for his own benefit, then I instruct you that said mortgage was fraudulent and void, and in that case your verdict should be for the defendants."

The propositions involved in this instruction were squarely passed upon in *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985. In that case it is said: "The tendency of the later decisions appears to be against declaring these instruments fraudulent in law, unless they are necessarily so upon their face, and toward leaving the question of fraud open to investigation as matter of fact; and this would seem to be not only consonant with reason, but in accord with sound policy."

Under the instruction above set out the jury were precluded from any investigation of the question of the good ²⁸⁷ faith of the parties, or the reasons underlying their conduct, all of which should have been left for their consideration, under proper instructions.

The only evidence applicable to the second proposition involved in the instruction was that the mortgagee, having collected the sum of three dollars—being proceeds of the sale of a portion of the mortgaged goods—thereupon turned the same over to the mortgagor, telling him to take it, as he “might need it.” The testimony concerning this transaction was clear and undisputed, and the effect of this latter instruction was to tell the jury that the plaintiff could not recover. The instruction should not have been given.

The judgment must be reversed and a new trial awarded.

Dunbar, Fullerton, and Reavis, JJ., concur.

FRAUDULENT CONVEYANCE.—ON EVIDENCE in cases of fraudulent conveyances, see the notes to *Brown v. Mitchell*, 11 Am. St. Rep. 757-759; *State v. Mason*, 34 Am. St. Rep. 402; *Burch v. Smith*, 65 Am. Dec. 157-164. When fraud is alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible; yet fraud cannot be presumed, but must be proved clearly and distinctly: *Snayberger v. Fahl*, 195 Pa. St. 336, 78 Am. St. Rep. 818, 45 Atl. 1965. However, fraud, like any other fact, may be established by a preponderance of evidence merely: See the note to *Brown v. Mitchell*, 11 Am. St. Rep. 759.

FRAUDULENT CONVEYANCE.—DECLARATIONS of a fraudulent vendor made subsequently to the conveyance and in the presence of the vendee are admissible against the latter: See the monographic note to *Horton v. Smith*, 42 Am. Dec. 633, on declarations of a vendor as evidence against his vendee to show fraud.

HALL v. LAW GUARANTEE AND TRUST SOCIETY.

[22 Wash. 305, 60 Pac. 643.]

FIXTURES.—GAS AND ELECTRIC LIGHT FIXTURES AND GLOBES, curtains, window and door screens, tables, water-tanks and windmills, when attached to a house, are not fixtures as between the mortgagor and mortgagee.

REPLEVIN—VERDICT—SUFFICIENCY OF.—In an action of replevin for the recovery of specified personalty, a verdict for the plaintiff finding that she is the owner of the property sued for, and assessing its value, is sufficient to justify a recital in the judgment thereon that they found that plaintiff was entitled to the possession and return of the property.

REPLEVIN — PLEADING — MOTION TO MAKE MORE DEFINITE.—In an action of replevin to recover various articles of personalty, it is error to refuse to grant defendant's motion that the complaint be made more definite and certain by setting forth the itemized value of each article sought to be replevied.

REPLEVIN—ERRONEOUS JUDGMENT.—In a simple action of replevin a plain money judgment is erroneous. The judgment in such case should be for the possession of the property, or the value thereof in case a delivery cannot be had, and damages for its detention.

Greene & Griffiths, for the appellant.

Martin, Joslin & Griffin, for the respondent.

306 DUNBAR, J. This is an action in replevin to recover certain personal property described in the complaint, or to recover the value thereof. The complaint was the ordinary complaint in replevin. The answer was a general denial. The property sought to be replevied was thirty curtains, ten **307** window screens, two screen doors, one table or sideboard, one hot water tank, one windmill, twenty-five globes for electric and gas lights, and twenty-five gas and electric light fixtures. The value of all the property was alleged to be three hundred and fifty dollars. The verdict was as follows: "We, the jury in the above-entitled cause, do find for the plaintiff, and that said plaintiff is the owner of the property mentioned in the complaint and that the value of said property is the sum of three hundred and thirty dollars."

The judgment, after reciting certain facts, concludes as follows: "It is therefore ordered, considered, and decreed that the plaintiff do have and recover of and from the defendant the sum of three hundred and thirty dollars, together with interest thereon from the twenty-first day of April, A. D. 1899, together with her costs and disbursements in this action."

A great many errors are alleged, the most of which allegations, we think, are without merit. We think no errors were committed in the admission or rejection of testimony. On the main proposition, as to whether the property sued for was property which followed the realty, it is hardly worth while to discuss the many cases cited by appellant; for, under the decision of this court in *Philadelphia Mortgage etc. Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382, and in accordance with modern authority generally, it is clear that the property sued for here was in no way affected by the mortgage; and the mortgage so tenaciously sought to be introduced in evidence, notwithstanding the admission of the respondent

that the premises had been sold under the mortgage and that the exemption period had expired, did not affect the character of the property in the least. We also think the demand upon a qualified agent of the appellant—if, indeed, a demand was necessary—was amply proven. The verdict, too, in our judgment, is in conformity with the ³⁰⁸ requirements of the statute; and we think the recital in the judgment that the jury found that the plaintiff was entitled to the possession and return of the property was justified by the verdict, although not expressed in so many words. The statement of the jury that they found for the plaintiff under the allegations of the complaint is equivalent, although it is not the requirement of section 5020 of Ballinger's Code, as contended by the appellant, that the jury shall find who is entitled to the possession of the property. The section is as follows: "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property."

It will be seen that the only requirement made of the jury, when they find in favor of the plaintiff, and the property has not been returned to the plaintiff, is to assess the value of the property. But if they find in favor of the defendant when the possession of the property has been taken from him, they find that he is entitled to a return thereof. Neither would we disturb the verdict of the jury on the question of the value of the property, under the testimony as shown by the record.

But we see no reason why the request of the defendant that the complaint be made more definite and certain, by setting forth the itemized value of each article sought to be replevied, should not have been granted. It was a reasonable request, and ought to have been granted. The defendant might have desired to test the value placed on some ³⁰⁹ articles, and admit the value placed on others, or he might have desired to proffer the possession of certain articles and contest the right to the possession of others; and many other reasons might be suggested in a case of this kind why the complaint should be itemized, as asked for. It is stated in respondent's brief, in

reply to this contention, that at least there was no prejudicial error in the refusal, for the reason that the court, upon overruling the motion to make more definite and certain, required the plaintiff to furnish the defendant with a bill of particulars. It certainly would have been competent for the court to have treated the motion as a request for a bill of particulars. But the statement that the court made the requirement of the plaintiff as above asserted is plainly denied by appellant in his reply brief, and the record fails to show any such transaction.

In addition to this, the judgment is not such as is contemplated by law. Section 5118 of Ballinger's Code provides that, in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or value thereof in case a delivery cannot be had, and damages for the detention. The principal purpose of the statute is to secure the recovery of the personal property, and it is only upon the happening of the contingency that the property cannot be recovered that the successful litigant is entitled to the value of the property. The judgment in this case, as we have seen, is a plain money judgment, which would properly have followed a successful action of trover. We do not think that the finding that the plaintiff was entitled to possession would aid the judgment. It must first appear that possession cannot be returned or obtained. Sections 5193-5195 specify the manner of enforcing judgments and strengthen the construction given to section 5118. It is insisted, however, by the respondent that inasmuch as the evidence shows that the property cannot be returned, and inasmuch as the appellant refused to return ³¹⁰ the property, but claimed to own the same, this claim and refusal constituted a conversion, and therefore the respondent was entitled to an independent verdict for the value. But this contention, we think, is not logical. This is a straight action of replevin. Every allegation of the complaint shows it to be such. It is in no sense an action for conversion. The plaintiff elected when she brought her action, and she elected the action in replevin, and it cannot be metamorphosed into an action of trover by the testimony adduced at the trial. The execution will determine whether the property can be returned. It is also claimed in respondent's brief that inasmuch as the appellant positively refused to make any return of any of the property whatever, but claimed to own the same, such action constituted a conversion, and that respondent was therefore entitled to a judgment for the amount assessed by the jury. If

this were true, a complaint in replevin would always result in a judgment for conversion; for the action in replevin is brought only when the return of the property is refused, and either the ownership or right of possession is always included in such an action. But even if such claim on the part of the respondent did constitute conversion, the plaintiff should have brought his action for conversion. For a review of the law on this proposition, see *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355.

The judgment is reversed, with instructions to grant a new trial and to sustain defendant's motion to make the complaint more definite and certain in the particulars mentioned in the motion.

Gordon, C. J., and Reavis and Fullerton, JJ., concur.

FIXTURES.—ON WHAT ARE FIXTURES, see the monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696. Gas fixtures are not a part of the realty: *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257; neither are mantels, water-heaters, and bathtubs: *Philadelphia Mortgage etc. Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382.

SEATTLE v. SMYTH.

[22 Wash. 327, 60 Pac. 1120.]

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE RESTRICTING HOURS OF LABOR.—A municipal ordinance making it unlawful for any contractor upon any public work to require or permit any day laborer or mechanic to work more than eight hours in any one calendar day is unconstitutional, as interfering with the right of persons to contract with reference to compensation for their services, neither unlawful nor against public policy.

E. De Bruler, for the appellant.

J. E. Humphries, H. Bostwick, S. H. Piles, G. Donworth, and J. B. Howe, for the respondents.

328 PER CURIAM. Respondents were charged with the violation of an ordinance of the city of Seattle, which makes it unlawful for any contractor or subcontractor upon any of the public works of the city to require or permit any day laborer or mechanic to work more than eight hours in any one calendar day. It is charged in the complaint that the respondents "did willfully and unlawfully permit one John Doe to

work and labor more than eight ³²⁹ hours in one calendar day." The superior court sustained a demurrer to the complaint, and the city has appealed.

Statutes and ordinances similar in character have been held unconstitutional by many courts, and we have not been cited to a single case wherein their constitutionality is asserted. The principle upon which they are held to be unconstitutional is that they interfere with the constitutional right of persons to contract with reference to compensation for their services, where such services are neither unlawful nor against public policy, nor the employment such as might be unfit for certain classes of persons—as females and infants.

"Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf, or to hire it out in the service of others. This is one of the first and highest of civil rights": Cooley on Torts, 2d ed., 326.

One of the most instructive cases upon the subject is the late one of *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, wherein the authorities are collated and the subject very exhaustively treated: See, also, *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362, and *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 24 Pac. 737.

The judgment of the superior court is affirmed.

EIGHT-HOUR LAW.—Legislation which seeks to make eight hours constitute a day's work is not justified as a police regulation: *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 59 N. W. 362; *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071.

DENNY v. COLE.

[22 Wash. 372, 61 Pac. 38.]

RECEIVERS—PARTNERSHIP—SUIT AGAINST—NECESSARY PARTIES.—A receiver of partnership property, appointed in a suit brought for a dissolution of the partnership, has such an interest in such property, legal and equitable, as to make him a necessary party in an action to foreclose a lien thereon.

Preston, Carr & Gilman and Piles, Donworth & Howe, for the appellant.

E. F. Blaine, for the respondent.

373 FULLERTON, J. The appellant, Flavius S. Cole, and the respondent, Ernest W. Price, were formerly partners, doing business under the firm name of Cole & Price. As such partners they were the owners of certain shares of **374** the capital stock of the Lumberman's Logging Company, a corporation. They became indebted to the Farmers' & Citizens' Bank of De Witt, Iowa, and the First National Bank of De Witt, Iowa, upon various obligations, aggregating, with interest, at the time of the commencement of the present action the sum of thirty-nine thousand six hundred and fifty-nine dollars and sixty-three cents. As security for this indebtedness, the firm of Cole & Price pledged with the above-named banks the shares of stock held by them in the Lumberman's Logging Company. After the pledge had been made, Cole brought an action against Price for a dissolution of the partnership and for an accounting, praying in his complaint for the appointment of a receiver to take possession of the property and assets of the partnership pending the litigation. The court, after notice and hearing, found that the partnership, and each of the members thereof, were insolvent, and appointed a receiver "to immediately take possession of all the property and assets of said firm, real and personal, . . . to manage and control said property during the pendency of said suit, and to collect debts due said partnership, and for that purpose, or for the purpose of recovering and reducing to the possession of said firm any of said property, to bring actions in his own name or in the name of said firm, and to defend any and all actions, and to intervene, in his own name or in the name of said firm, in any and all actions in which the rights or interests of said firm or its creditors might be involved, with full power by law vested in such receivers, with such other powers and such other duties as the court might from time to time order." The receiver duly qualified, and was acting as such at the time of the commencement of the present action, but never reduced, or attempted to reduce, to possession the property pledged to the banks. The respondent, Charles L. Denny, is the assignee of the indebtedness of Cole & Price to the aforesaid **375** banks, and brought this action for the purpose of obtaining a personal judgment against Cole & Price, and to foreclose the pledgee's lien upon the stock. At the time the action was commenced, he obtained an order from the court authorizing the action to be brought against the receiver, and made the receiver a

party defendant along with Cole & Price; but shortly thereafter, upon application of the receiver, the order was vacated, and the receiver dismissed from the proceedings. Default was entered against the respondent Price. The appellant, Cole, answered the complaint, making certain denials, and pleading as an affirmative defense the appointment of the receiver, and the proceedings by which he was dismissed from the action, praying that the action be dismissed because there was a defect of parties defendant. Judgment for the amount due and of foreclosure of the lien was entered in favor of Denny, and Cole appeals. The question presented is, Did the receiver have such an interest in the pledged stock as to make him a necessary party defendant in an action to foreclose the pledgee's lien?

It seems to have been the view of the court below, and the respondent urges in this court, that no title to partnership property passes to a receiver of such property appointed in a suit brought for a dissolution of the partnership, and that, for this reason, a receiver of partnership property is not a necessary party to a suit brought to foreclose a lien thereon. On the question of the receiver's title the authorities are not uniform, but there is respectable authority holding that he takes, by virtue of his appointment, both the legal and equitable title. In *High on Receivers*, third edition, section 539, the rule is laid down as follows:

"A receiver of the effects of a partnership, appointed in an action for the settlement of the firm business, is regarded as vested with the whole equitable title to the partnership property, without any assignment for that purpose, ³⁷⁶ and in an action to obtain possession of the property he represents the interests therein of all parties to the suit in which he was appointed. And it is held that, to enable him to properly discharge his trust, he may, *suo motu*, and without special leave of the court, bring an action to possess himself of the property to which he is officially entitled, incurring no risk thereby except as to costs, and, least of all, have the persons against whom he brings such action the right to object that he brings suit without leave of court. The appointment of a receiver upon the insolvency of the firm operates, in effect, as an assignment of the firm assets, with all securities incident thereto, for the benefit of firm creditors. But since a receiver's authority is conferred by law, and not like that of a voluntary assignee

of the parties, a receiver of a partnership succeeds, not only to the legal title of the partners as joint tenants, but also to the equitable rights and remedies of the firm and of its beneficiaries."

So in Beach on Receivers, Alderson's edition, section 585, it is said: "Upon the appointment of a receiver, the entire legal and equitable title to the tangible property of the firm, as well as to its rights and remedies, vest in him. And real property, held by the members of a firm as tenants in common, but used for partnership purposes and built on with partnership funds, will be treated as partnership property, and will pass to the receiver."

The rule is also supported by the following cases: *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Pearce v. Gamble*, 72 Ala. 341; *Winslow v. Wallace*, 116 Ind. 317, 17 N. E. 923; *Wallace v. Yeager*, 4 Phila. 251.

And in *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138, we held that a receiver of the property of an insolvent corporation was a quasi assignee of the property, and vested with sufficient title to maintain an action in his own name in relation thereto. By the code (Ballinger's Code, sec. 5455) ³⁷⁷ a receiver is defined as "a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, . . . to manage and dispose of it as the court or officer may direct," and has power "to bring and defend actions" affecting property connected with his trust: Ballinger's Code, sec. 5458. But if it be held that a receiver of partnership property does not have title thereto in the sense that the partnership had title prior to his appointment, it is an inaccurate statement of his relations to the property to say that he is merely its custodian. As was said by the supreme court of Minnesota in *Henning v. Raymond*, 35 Minn. 303, 29 N. W. 132: "When a court has taken property into its own charge and custody, for the purpose of administration and disposition, in accordance with the rights of the parties to the litigation, it is in custodia legis. The title of the property for the time being, and for the purpose of such administration, may, in a sense, be said to be in the court. The proceeding by receivership is quasi in rem, so far as it involves a sequestration of assets. The receiver is appointed for the benefit of all concerned. He is the representative of the court, and

of all the parties interested in the litigation wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases of administering the property."

And in that case it was held that the receiver had such a special interest in the property as to make him the real party in interest within the meaning of a statute which provided that every action should be prosecuted in the name of the real party in interest. In the case of *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647, it was held that on the appointment of a receiver for the settlement of a partnership, the surviving partner was superseded in the possession and control of the partnership effects, and in the authority to settle up the partnership ³⁷⁸ affairs; that this right was vested exclusively in the receiver, and that he was a necessary party to any suit affecting the property of the partnership: Citing *Kirkpatrick v. Corning*, 38 N. J. Eq. 234. While, as we have shown, our statute provides that a receiver has power to dispose of property held by him as receiver on the order of the court or officer appointing him, it is generally held, in the absence of a statute, that the court may order a sale of the property in the hands of the receiver whenever it deems a sale necessary or advisable in order to protect the rights and interests of all parties, and that a purchaser at such sale will take the legal title to the property purchased. It would seem to be hard to reconcile these principles with the doctrine that a receiver is only the custodian of the property involved in the receivership, and we think it must be held that he has such a special property therein as to make him the representative of the rights of the partners in all actions or proceedings affecting the property, and as such entitled to notice in all cases where the partners would have been entitled to notice had there been no receiver.

In the case at bar, notwithstanding the pledge of the stock in question by Cole & Price as security for their indebtedness, they still retained an interest therein; namely, their right to pay the debt and redeem the stock from the lien of the pledge. They could not have been barred of this right by a decree of foreclosure in which they were not made parties and served with process. The receiver, having succeeded to their rights in this respect, was also a necessary party to the foreclosure proceedings, and the failure to make him a party rendered the decree of foreclosure nugatory: *Ballinger's Code*, sec. 4833; *Bacon v. O'Keefe*, 13 Wash. 655, 43 Pac. 886.

The judgment of foreclosure is reversed and the cause remanded, without prejudice to the right of the respondent, ³⁷⁹ Denny, to renew his application for leave to sue the receiver.

Gordon, C. J., and Dunbar and Reavis, JJ., concur.

RECEIVER.—The title to property is not changed by the appointment of a receiver: *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752. Yet a partnership receiver, appointed in a suit by the representative of a deceased partner against the surviving partner to compel a settlement of the partnership affairs, is invested with the whole equitable title to the firm assets without an assignment, and represents, in any suit affecting the firm property, the interests therein of all parties to the suit in which he was appointed, if not of the persons who are not parties: *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510. But see the monographic note to *American etc. Bank v. McGettigan*, 71 Am. St. Rep. 353, 354.

HACKER v. WHITE.

[22 Wash. 415, 60 Pac. 1114.]

EXECUTION CREDITORS PURCHASING AT THEIR OWN SALES are not bona fide purchasers, within the meaning of recording acts, so as to be entitled to priority over prior unrecorded deeds.

W. Loveday, for the appellant.

Allyn & Allyn, for the respondents.

415 DUNBAR, J. This is an action brought by appellant against respondents to quiet title to certain town lots in ⁴¹⁶ the city of Tacoma. The following are the pertinent facts: On January 16, 1896, William Hacker recovered judgment against Clara B. Stevenson in a foreclosure proceeding for the sum of nine hundred and thirty-two dollars and ninety-six cents. Subsequently, the mortgaged property was sold, and there was left on the judgment a deficiency of four hundred and seventy-nine dollars and thirty-nine cents. On February 29, 1896, execution was issued on the deficiency, under which levy was made on the property in controversy March 2, 1896. Sale of the same was made April 6, 1896, and the property was bid in by the judgment creditor. The sale was confirmed April 17, 1896, and on July 8, 1897, the sheriff's deed was executed to William Hacker, who deeded the land to Edward Hacker, the plaintiff and appellant herein, September 20, 1897. This

deed was recorded May 28, 1898. On August 3, 1895, the said property was conveyed to Clara B. Stevenson, the deed of conveyance being recorded on the same day. On August 5, 1895, Clara B. Stevenson deeded the land to Nancy A. White, one of the respondents herein, which deed was not recorded until June 2, 1896. The finding of the lower court is to the effect that the deed of Clara B. Stevenson to the respondent Nancy A. White was for a good and valid consideration, and was a bona fide transaction. The good faith of this transaction is vigorously assailed by the appellant, but we think the finding of the court is fully warranted by the testimony. There appear none of the badges of fraud which were proven in the case of *O'Leary v. Duvall*, 10 Wash. 666, 39 Pac. 163, which was relied upon by appellant. Nor can we see that there was any evidence of fraud whatever; so that the purely legal proposition is presented, Will the levy of an execution creditor prevail over an unrecorded deed?

It is conceded that in this state the judgment is a lien on the real, and not the apparent, interest of the debtor; ⁴¹⁷ so that, if the appellant prevails in this action, he must bring himself within the provisions of the statute in relation to bona fide purchasers: 1 Hill's Code, sec. 1439. On the question of whether an execution creditor purchasing at his own sale is a bona fide purchaser, within the meaning of the recording act, there is an acknowledged conflict of authority. But it is not necessary to discuss the relative merits of these authorities, for this court has uniformly held that such purchaser was not a bona fide purchaser, although the appellant has placed a different construction upon such decisions. The decisions, however, show conclusively that the court has made no distinction in principle between purchasers of personal and real property. In *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260, it was said: "An execution creditor is not a bona fide purchaser. He parts with no consideration on account of the goods, and he takes no greater interest than his debtor has." And the matter under discussion in that case did not tend to modify the principle announced.

In *Elwood v. Stewart*, 5 Wash. 736, 32 Pac. 735, 1000, where the subject of the controversy was real estate, the same doctrine was announced; and while the question of notice was involved, the opinion on petition for rehearing shows conclusively the general doctrine sought to be established.

In *Benney v. Clein*, 15 Wash. 581, 46 Pac. 1037, while it is true that the question of the effect of the vacation of a judgment was before the court, the question under discussion here was also directly involved; and in answer to respondents' contention that they should be protected by a condition in the order of the court, when granting the motion to vacate the judgment, that the title of ⁴¹⁸ innocent purchasers and subsequent bona fide encumbrancers should not be disturbed, it was said: "The respondents in this action are not in a position to avail themselves of this provision of the order. As execution plaintiffs they were neither 'innocent purchasers' nor 'bona fide encumbrancers.'"

In *Dawson v. McCarty*, 21 Wash. 314, 75 Am. St. Rep. 841, 57 Pac. 816, it was held that: "Since a judgment lien on lands binds only the interest which the debtor actually has therein, an unrecorded mortgage takes precedence over a subsequent judgment."

In that case the question was discussed at length, and the announcement made that: "The decided weight of authority seems to be that the term 'bona fide purchasers' in the recording act does not include a judgment creditor."

The theory, of course, is that he has not parted with any consideration, and hence his relation to the property in dispute is, in substance, the same as it was before the purchase, which seems to be a reasonable distinction between the judgment debtor and a stranger to the transaction who pays his money, as an independent transaction, for the property. We think it was the latter class of purchasers which the legislature intended to protect.

Affirmed.

Gordon, C. J., and Fullerton and Reavis, JJ., concur.

Anders, J., not sitting.

Title Acquired by Purchaser at His Own Execution Sale.

Protection Against Unrecorded Deed.—Notwithstanding the doctrine announced in the principal case, undoubtedly the great weight of authority tends to establish the rule that a judgment creditor who purchases at a sale under execution upon his own judgment, and does not pay the purchase price otherwise than by a credit upon such judgment, is regarded as a purchaser in good faith and for value, and is protected against a prior unrecorded deed by the judgment debtor conveying the property thus purchased, if at the time

of such purchase, the judgment creditor is without notice, actual or constructive, of such unrecorded deed: *Lusk v. Reel*, 36 Fla. 418; 51 Am. St. Rep. 32, 18 South. 582; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Barnett v. Squyres*, 93 Tex. 193, 77 Am. St. Rep. 854, 54 S. W. 241; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579; *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327, 53 N. E. 171; *Walker v. McKnight*, 15 B. Mon. 467, 61 Am. Dec. 190; *Hall v. Griffin*, 119 Ala. 214, 24 South. 27; *Low v. Blinco*, 10 Bush, 331.

An execution creditor who purchases at his own sale stands on the same footing, in respect to prior unrecorded deeds, as any other bona fide purchaser: *Gower v. Doheney*, 33 Iowa, 36; *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517; *Ettenheimer v. Northgraves*, 75 Iowa, 28, 39 N. W. 120. Such purchaser, without notice, is a bona fide purchaser as against an unrecorded deed within the meaning of registration acts: *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; and even where it is held that an execution creditor who purchases the land of his debtor at execution sale is not a bona fide purchaser, it is still maintained that he is protected against a prior unrecorded deed from the debtor, by virtue of registration laws which protect "all subsequent purchasers and creditors," provided he has no notice of the deed before his judgment becomes a lien upon the property: *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657. In *Lance v. Gorman*, 136 Pa. St. 200-210, 20 Am. St. Rep. 914, 20 Atl. 792, it was said, "though a judgment creditor be not a purchaser within the recording acts, a purchaser under his own judgment has all the qualities of one by relation, from the date of the lien, and his title, being thus of record and contemporaneous with the judgment, is paramount to all conveyances or encumbrances subsequently attempted."

It is quite true that cases may be found which maintain that a judgment creditor is not a bona fide purchaser within the meaning of registry laws, where the sole foundation of his right is his own judgment, and he cannot prevail as against a purchaser in good faith holding under an unrecorded deed. Such a case is *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976, and other Indiana cases referred to therein. Very little reliance, however, can be placed upon the stability of the ruling in these cases, in view of the fact that the decisions in Indiana upon the subject, while numerous, are wholly inharmonious, and cannot be reconciled upon any basis whatever. The late case of *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327, 53 N. E. 171, which will be more fully noticed hereafter, holds that a judgment creditor, who buys land, in good faith, at an execution sale on his own judgment, takes the title thereto clear of any prior secret equities of which he has no notice, and while it does not in terms overrule *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976, it in effect does so, and criticises it in an unmeasured manner.

The true rule, we think, is that a judgment creditor who purchases at his own execution sale, and has the amount of his bid credited on his judgment, must be considered a bona fide purchaser within the recording acts, and protected as such, and that to hold otherwise might often result in the sacrifice of the property and loss of the debt, to the detriment of both debtor and creditor: *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Wallace v. Campbell*, 54 Tex. 87. It has been held in subsequent Texas cases that the payment of five dollars by a creditor at a sale under his own judgment does not entitle him to protection as an innocent purchaser for value: *Evans v. Welborn*, 74 Tex. 530, 15 Am. St. Rep. 858, 12 S. W. 230; and that where the owner of a judgment, under which land is sold at execution sale, becomes the purchaser, and credits the purchase money of the land upon his execution, he takes the land charged with all the equities to which it is subject, and acquires no title under the execution sale as against a claimant in possession, who has paid the purchase money and made valuable improvements under a parol contract, and this, although the judgment debtor was the apparent owner of the land when the judgment was rendered: *Barnett v. Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98, 7 S. W. 525. It has also been held that a judgment creditor who purchases under his judgment stands in the debtor's place, and takes the property subject to every liability under which the debtor held it: *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; also that such purchaser is not a purchaser for a valuable consideration, nor entitled to protection as such: *Williams v. Hollingsworth*, 1 Strob. Eq. 103, 47 Am. Dec. 527; *Davis v. Hamilton*, 50 Miss. 213; nor is he an innocent purchaser: *Hill v. Coolidge*, 33 Ark. 621; *Carnahan v. Yerkes*, 87 Ind. 62; as against prior rights of third persons: *Aultman v. George*, 12 Tex. Civ. App. 457; *Benney v. Clein*, 15 Wash. 581, 46 Pac. 1037. "Judgment creditors are not regarded in equity as bona fide purchasers, and entitled to the consideration which equity gives them, when they become such without notice for a valuable consideration actually paid, but they are looked upon simply as proceeding in invitum to enforce their legal demands, and are not entitled to the same favor as a purchaser, whose right may be enforced through the conscience of the other party": *Banning v. Edes*, 6 Minn. 402, 408.

Protection Against Secret Equities.—Notwithstanding these cases which maintain that a judgment creditor purchasing at his own sale is not a bona fide or innocent purchaser, nor a purchaser for a valuable consideration, entitled to any protection against prior unrecorded deeds or secret trusts and equities of which he has no notice, the great weight of well-considered authority clearly establishes the better and more reasonable rule that a judgment creditor who purchases at his own sale and simply has the purchase price credited upon such judgment must be regarded as an innocent purchaser in good faith and for value, and is protected against

all equities and defects in title of which he had no notice, actual or constructive: *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579; *Evans v. McGlasson*, 18 Iowa, 150; *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517; *Butterfield v. Walsh*, 21 Iowa, 97, 89 Am. Dec. 557; *Gower v. Doheney*, 33 Iowa, 36; *Butterfield v. Walsh*, 36 Iowa, 534; *Etteneheimer v. Northgraves*, 75 Iowa, 28, 39 N. W. 120; *Wood v. Chapin*, 13 N. Y. 599, 67 Am. Dec. 62; *Vitito v. Hamilton*, 86 Ind. 137; *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327, 53 N. E. 171.

In *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209-212, 32 Pac. 579, after a discussion of the cases pro and con, the court said: "It is believed, however, that the current of modern authority tends to the doctrine that a judgment creditor purchasing at his own sale, equally with a third party making a purchase under the execution, is protected against latent equities of which he had no notice." In *Gower v. Doheney*, 33 Iowa, 36, it appeared that the judgment debtor held lands under an implied trust, in pursuance of which, subsequently to the judgment, he conveyed to the cestui que trust, that the latter failed to record his deed, and the lands were purchased by the judgment creditor at execution sale without notice of the deed or of the equitable estate, and it was held that the execution creditor took his title freed of the equity. The decision was based upon the equitable theory that where one of two innocent persons must suffer, the loss must fall upon that one who has been guilty of the first negligence.

An execution plaintiff who acquires land at a sheriff's sale cannot be compelled to surrender or convey it to one who has the equitable right to the land under a bond for title, when the execution purchaser had no notice of the existence of the right before he obtained the title: *Walker v. McKnight*, 15 B. Mon. 467, 61 Am. Dec. 190. A judgment creditor purchasing at his own execution sale acquires the title and rights of a bona fide purchaser for value as against third persons claiming the land through the judgment debtor by secret trusts or unrecorded instruments, of which he had no notice, actual or constructive, before the sale, and he buys subject to all equities and rights of third persons of which he has actual or constructive notice before his purchase: *Newman v. Davis*, 24 Fed. 609. In the late case of *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327, 53 N. E. 171, it was decided that a judgment creditor, who buys land in good faith at an execution sale on his own judgment, takes the title thereto clear of any prior secret equities of which he had no notice. It is to be hoped that this adjudication will be the final determination of the question in the state of Indiana, wherein the decisions have, heretofore, been equally forcible on opposing sides of the question, and wherein the supreme court has been known to lay down opposing doctrines and to decide the same question both ways at the same term of court, as was done in *Vitito v. Hamilton*, 86 Ind. 137, and *Carnahan v. Yerkes*, 87 Ind. 62. In *Pugh v. Highley*, 152 Ind. 252, 71 Am. St.

Rep. 327, 328, 53 N. E. 171, the court, in discussing the topic, said: "A creditor who without notice cancels a pre-existing debt in consideration of his debtor's conveying him land is a good faith purchaser for value. To hold that the debtor may sell his land to a stranger and turn over the purchase price to his creditor in satisfaction of the debt, whereby the creditor is free from claimants of secret equities, and to hold that the creditor, if the debtor conveys the land to him in payment of the debt, is liable to be affected by secret equities, is to approve the roundabout and involved, and to condemn the straight and simple, method of accomplishing the same result, using the land to pay the debt. A good faith purchaser other than the judgment creditor, at a proper execution sale on a valid judgment, who pays the sheriff the amount of his bid, acquires all the right, title, and interest in the land sold that the judgment debtor could have conveyed to him by deed of bargain and sale. As to secret equities, he stands on the same footing with the good faith purchaser for value from the apparent owner of the land. In both cases the purchaser irrevocably parts with his money, relying and having the right to rely on getting not merely what the debtor actually owns, but what from the public records he apparently owns. In either case, before the debtor conveys, or before the sheriff conveys for him, the holder of the prior secret equity has had it in his power to prevent anyone's being misled by the false situation. If either the subsequent purchaser or the holder of the secret equity must suffer or be postponed, it should be the latter, since his initiative made delusion by the debtor's apparent circumstances possible. What, now, is the position of the judgment creditor who purchases at a proper execution sale on his own valid judgment? The authorities holding that he is not a good faith purchaser for value seem to be based upon either or both of two propositions: that he has parted with nothing—has not changed his position for the worse; and that he will not be permitted to urge a claim that rises higher than the source of his right, by that, meaning the lien of his judgment. The judgment creditor purchaser has parted with value and has changed his position for the worse. He has paid to the sheriff the amount of his bid in cash, actually or constructively, for if he merely receipts for the payment of his judgment, in whole or in part, the transaction, in contemplation of law, is the same as if he had paid the sheriff in cash and the sheriff had paid him in cash. His payment is just as irrevocable as that of the stranger purchaser. His right to vacate the satisfaction of the judgment is no greater than that of the stranger purchaser.

"He has also changed his position for the worse, if he is not to be permitted to hold under the execution sale the same as a stranger purchaser. The debtor may have directed the sheriff to levy upon the very land that was subject to the secret equity. Manifestly, the judgment creditor without notice is ethically as innocent in binding it as a stranger. By the sale the execution be-

comes *functus officio* and the judgment creditor has lost the lien of his execution upon the goods and chattels of the debtor. By the sale, the judgment is satisfied, *pro tanto*, and the judgment creditor has lost the lien of his judgment upon the other lands of the debtor.

"But, it is said, he may not urge a claim of higher value than the source of his right—that is, his judgment lien. Why not? If an innocent purchaser pays for a deed, he acquires the apparent title of the grantor, and the holder of the secret equity will not be heard to say aught against it. That is, the purchaser gets more than the debtor had. Stronger than the innocent stranger's, however, are the equities of the judgment creditor purchasing without notice. For the holder of the secret equity has less opportunity to protect himself against the stranger than he has against the judgment creditor, since he may have no means of ascertaining, even by the exercise of the highest vigilance, to whom his secret trustee is about to convey; but it is only his own inaction that can prevent his learning of the judgment before sale—in time to subordinate the lien to his rights. Shall equity offer a premium for sloth? If not, then the judgment creditor purchaser should likewise take more than the debtor had. If an owner of an antecedent debt cancels in good faith the obligation in consideration of a deed from his debtor, he takes the title free from secret equities; that is, the purchaser gets more than the debtor had. Shall the private, maybe secret, extinguishment of the debt be held of more exalted worth in equity than the law's public and open satisfaction thereof? If not, then the judgment creditor purchaser should likewise take more than the debtor had. If a stranger without notice buys at execution sale, his purchase cuts off secret claims against the land; that is, the purchaser gets more than the debtor had. The law does not prohibit, but, on the contrary, encourages the judgment creditor to bid; for it is in the interest of the law's execution of the judgment and to the advantage of the debtor that he should compete with other bidders. If a stranger purchases, the sheriff pays over the money to the judgment creditor, who thereby receives satisfaction out of the property on which his judgment may not have been actually a lien. Shall equity accredit the circuitous, and discredit the direct, means to the same end? If not, then the judgment creditor purchaser should likewise take more than the debtor had.

"It is a misapprehension to say that the rights of the judgment creditor purchaser arise from the judgment lien, and therefore continue subject to prior secret equities. His position as purchaser is in no sort of legal privity with his position as judgment creditor. When the sale is made, he ceases to be a judgment creditor. His rights henceforward are those of a purchaser at execution sale. The contention that the rights of a purchaser at execution sale are one thing if he is a stranger and another if he is the judgment creditor, is untenable in reason": *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327-330, 53 N. E. 171.

A judgment creditor purchasing at his own execution sale takes subject to all rights and equities of third persons of which he has actual or constructive notice before he purchases: *Newman v. Davis*, 24 Fed. 609; *McAdow v. Black*, 4 Mont. 475. Notice to the execution creditor at any time before he purchases affects his conscience, and he may be compelled, in obedience to the equity evidenced by the bond or unrecorded deed, to transfer the legal title to the party against whom he ought not in good conscience to hold it: *Low v. Blinco*, 10 Bush, 331; *Halley v. Oldham*, 5 B. Mon. 233, 41 Am. Dec. 262. An execution creditor does not become a bona fide purchaser by buying property at a sale upon his execution, if such property has been fraudulently purchased by the judgment debtor: *Devoe v. Brandt*, 53 N. Y. 462.

Reversal of Judgment—Irregularities.—An execution plaintiff who holds a sheriff's certificate of sale of the property of his debtor is not a purchaser in good faith and for value in the sense that he is entitled to retain the property purchased by him under a judgment subsequently reversed. His title is divested by the reversal, and his grantee, though not a party to the action, nor cognizant of the defect in title, is not a purchaser in good faith, and acquires no greater rights than the judgment plaintiff had: *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066; *Stroud v. Casey*, 25 Tex. 740, 78 Am. Dec. 556; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459. The contrary doctrine is, however, announced in *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358.

A judgment creditor purchasing at his own execution sale is chargeable with notice of all irregularities in the proceeding, and he is not such a bona fide purchaser for value as to be relieved of the effect of notice of such irregularities: *Smith v. Huntoon*, 134 Ill. 24, 23 Am. St. Rep. 646, 24 N. E. 971; *Boos v. Morgan*, 130 Ind. 395, 30 Am. St. Rep. 237, 30 N. E. 141.

FIDELITY TRUST COMPANY v. PALMER.

[22 Wash. 473, 61 Pac. 158.]

NEGOTIABLE INSTRUMENTS — CITY WARRANTS — TITLE OF PURCHASER.—A city warrant for all purposes involving its title is negotiable, and, if taken, when indorsed in blank, from its apparent owner by a bona fide purchaser, the latter acquires title, although the seller is the mere custodian thereof, and not the real owner.

TRIAL—NECESSITY FOR FINDINGS.—If the court withdraws the case from the jury and enters judgment dismissing the action, no findings of fact or conclusions of law are required to be made.

Campbell & Powell, for the appellant.

Bates & Murray and J. H. McDaniels, for the respondent.

474 GORDON, C. J. Plaintiff sued to recover the value of a city warrant of the city of Tacoma. It appears that the warrant was originally issued to the Fox Island Clay Works, and thereafter indorsed to the Washington Fire Clay Company, and that company indorsed it in blank. Plaintiff's intestate, S. W. Perkins, became the owner thereof, and subsequently intrusted it to his attorney, D. K. Stevens, at the latter's request, to enable him to use the same in evidence in a case then pending in the superior court. Stevens, instead of returning the same to his principal, sold it to the defendant, who paid par value therefor. At the conclusion of the evidence for plaintiff, the trial court, upon defendant's motion, discharged the jury and entered judgment in defendant's favor, dismissing the action and for costs, pursuant to section 4994 of Ballinger's Code.

At the trial the defendant was examined as a witness for plaintiff. The purpose of his examination was to show that he knew at the time of his purchase of the warrant that plaintiff's intestate was the owner of it. We have examined his testimony very carefully, and it seems perfectly **475** clear that he was not acquainted with Mr. Perkins, or knew of his existence, until after he purchased the warrant; that he believed and understood that Stevens owned it; and a reading of his testimony we think admits of no other conclusion than that he purchased it in good faith, without any actual knowledge of Perkins' ownership, or of any fact or circumstance which would be sufficient to put a prudent person upon inquiry. As already observed, the warrant itself afforded no notice or intimation of Perkins' ownership, and, if the rule that is applicable to negotiable paper can be invoked in respondent's favor, the judgment of the trial court was unquestionably correct. Appellant contends that such a warrant is not a negotiable instrument, but is intended as a mere voucher of the city treasurer when paid. The great weight of authority is that a county or city warrant possesses all of the qualities of negotiable paper but one, viz., that it is open to any defense which might have been made to the claim upon which it is founded. For all purposes involving its title, it must be treated as negotiable: Union Sav. Bank etc. Co. v. Gelbach, 8 Wash. 497, 36 Pac. 467; District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694; Furgerson v. Staples, 82 Me. 159, 17 Am. St.

Rep. 470, 19 Atl. 158; Garvin v. Wiswell, 83 Ill. 215; Crawford County v. Wilson, 7 Ark. 214. Such being its character, the case is not affected by the fact that Stevens had no authority to sell the warrant: Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank, 179 Ill. 599, 70 Am. St. Rep. 135, 54 N. E. 297; Garrett v. Campbell (Indian Ter., June 12, 1899), 51 S. W. 956; Weirick v. Mahoning County Bank, 16 Ohio St. 296.

The procedure of the trial court was in accord with the statute (Ballinger's Code, sec. 4994), and the court was not required to make findings of fact and conclusions of law: 470 Barkley v. Barton, 15 Wash. 33, 45 Pac. 654; Thorne v. Joy, 15 Wash. 83, 45 Pac. 642; Noyes v. King County, 18 Wash. 417, 51 Pac. 1052.

The judgment and order appealed from will be affirmed.

Dunbar, Fullerton, and Reavis, JJ., concur.

WARRANTS ISSUED BY MUNICIPAL CORPORATIONS are not negotiable: See the notes to Clark v. Des Moines, 87 Am. Dec. 440; Arapahoe v. Albee, 8 Am. St. Rep. 206. Compare Furgerson v. Staples, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; Willis v. French, 84 Me. 593, 30 Am. St. Rep. 416, 24 Atl. 1010.

CHEZUM v. CLAYPOOL.

[22 Wash. 498, 61 Pac. 157.]

JUDGMENTS—RES JUDICATA—RELIEF IN EQUITY.—If there is a full, complete, and adequate remedy at law against a judgment, by motion to vacate and set it aside, and to appeal from the order made upon such motion, a person who has moved to vacate a judgment, and has failed to take an appeal from the denial of his motion, is estopped to maintain an action in equity to cancel such judgment. The decision upon the application to vacate the judgment at law is res judicata, and a bar to any subsequent proceeding in equity.

E. E. Cushman, for the appellants.

G. L. McKay and I. A. Town, for the respondents.

498 GORDON, C. J. In December, 1894, the superior court of Pierce county rendered judgment in favor of Caroline Bokien and against the State Insurance Company for the sum of six hundred dollars and costs. An appeal was taken to this

court and the judgment affirmed: *Bokien v. State*, 14 Wash. 39, 44 Pac. 110. In the order of remittitur to the lower court the costs of the trial court were, by inadvertence, omitted. On March 31, 1896, the superior court, upon motion of counsel for Bokien, proceeded to enter judgment in conformity with the remittitur of this court, and included therein the costs arising in the trial of the action. Subsequently, and during the years 1896, 1897, and 1898, various writs of garnishment and execution were issued, based upon that judgment, and certain proceedings supplemental to execution were had and taken; and in October, 1898, the respondents in this ⁴⁹⁹ case, who were sureties upon the appeal bond, and against whom judgment went, moved to vacate and set aside the judgment of March 31, 1896, upon various grounds. This motion was supported by affidavit, and, after hearing, was denied by the court. No appeal was taken therefrom. Subsequently this action was brought to cancel the judgment. A demurrer to the complaint was overruled, and the appeal in the present instance is from a judgment in plaintiff's favor, directing the cancellation of the judgment.

We think that plaintiffs have mistaken their remedy, and that the decision upon the application to vacate the judgment was a bar to any subsequent proceeding. It is fundamental that equity will not interfere where there is a full and adequate remedy at law, and our statute (*Ballinger's Code*, secs. 5153-5162) provides such a remedy. It is not pretended that the plaintiffs in the present action were not aware of the existence of the judgment. On the contrary, although knowing its terms and provisions, and the repeated efforts to enforce it, they took no steps to have it modified or vacated for upward of two years, when they proceeded to move against it. The record does not advise us of the grounds upon which the decision went against them, and it is not material to the present inquiry what the real ground of decision was. It is enough to know that the proceeding afforded by the statute for vacating or modifying judgments is not a summary one, that its provisions are ample to enable justice to be done, and that an appeal is allowed to this court from the order entered therein: *Northern Pac. etc. Ry. R. R. Co. v. Black*, 3 Wash. 327, 28 Pac. 538; *Seattle etc. Ry. Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567.

As already said, the statute affords a full, complete, and adequate remedy. Such being the case, it must be regarded ⁵⁰⁰ as exclusive; and, having unsuccessfully sought to obtain

a decision in their favor by resorting to that proceeding, plaintiffs are bound by such decision, and cannot avoid the effect of it by an action like the present.

The judgment will be reversed and the cause remanded, with direction to the superior court to dismiss.

Dunbar, Fullerton, and Reavis, JJ., concur.

JUDGMENT.—TO OBTAIN RELIEF in equity from a judgment, the complainant must show that unless he obtains relief in equity he is without any adequate remedy. If there is a remedy by appeal or by motion for a new trial, relief cannot be had in equity: See the monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 221, 230, on relief in equity against judgments. On negligence as a bar in equity to relief against judgments, see the monographic note to *Payton v. McQuown*, 53 Am. St. Rep. 444-453.

JAMES v. SEATTLE.

[22 Wash. 654, 62 Pac. 84.]

MUNICIPAL CORPORATIONS—EXPENSES OF OFFICER—LIABILITY FOR.—Expenses incurred by a member of a city council under authority of such council in visiting other cities, for the purpose of informing himself upon subjects connected with municipal matters, are not necessary expenses incurred in the performance of official duties, and the city is not liable therefor, although the claim has been audited and ordered paid by the city council.

MUNICIPAL CORPORATIONS—RIGHT TO REFUSE TO PAY CLAIM.—If a city council is without power to authorize the payment of a claim against the city, the comptroller thereof may properly refuse to countersign the warrant directing its payment.

J. K. Brown, for the appellant.

W. E. Humphrey and E. Von Tobel, for the respondent.

656 REAVIS, J. In October, 1898, the city council of Seattle passed an ordinance providing "that a special committee consisting of the whole membership of the city council, or so many members as may be able to serve, and such executive officers as may be chosen by the city council, be and hereby are appointed to visit the cities of Duluth, West Superior, St. Paul and Minneapolis, Minnesota, Great Falls, Montana, Spokane, Washington, and such other cities as may be deemed advisable by said committee, for the purpose of securing information upon the matters referred to in the preamble of this or-

dinance." The matters referred to in the preamble were "waterworks, street paving, street lighting, terminal facilities, and other municipal matters which are now, and constantly will be, coming before the legislative and executive departments for consideration." The appellant, with other members of the city council and some other city officers, in October, 1898, visited St. Paul, Minneapolis, Duluth, West Superior, and Spokane, for the purpose of investigating and securing information concerning the matters mentioned in the preamble of the ordinance, and made necessary expenditures for his transportation, board, and lodging. In November, 1898, he filed with the secretary of the auditing committee his claim against the city for such expenditures. The claim was duly and regularly audited, reported to the council and approved, and an ordinance adopted directing a warrant to be drawn for appellant's claim, with others, and appropriating money from the general fund to pay the same. The warrant was drawn in appellant's favor for the amount, and signed by the mayor. But the respondent Parry, city comptroller, refused to countersign the same, and the defendant city refused to deliver the warrant to appellant. The suit was brought to procure a peremptory ⁶⁵⁷ writ of mandate to compel the respondent Parry, as city comptroller, to countersign and to compel the city to deliver to plaintiff the warrant. The respondents demurred to the affidavit for the writ, on the ground that it does not state facts sufficient to constitute a cause of action, or to entitle plaintiff to the relief therein prayed for. The demurrer was sustained, and the appeal is from the order sustaining the demurrer and the judgment entered in favor of respondents.

It is urged here by counsel for appellant that the comptroller is a ministerial officer and has no discretion in the discharge of his duties. The city charter provides that he shall countersign all warrants upon the treasury. Several authorities are cited to support appellant's contention. The case chiefly relied upon is that of *McConoughey v. Jackson*, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863. In that case the plaintiff applied for a writ to compel the city clerk to issue a warrant for a claim for expenses incurred by him in procuring, at the request of the city, through the trustees thereof, counsel and legal services for the city. The bill was approved by the trustees and ordered paid. One of the defenses set up by the clerk was a denial of the indebtedness. With reference to this the court observed: "The law has not constituted the clerk either the

guardian of the board of trustees or an appellate court to pass upon the facts once decided by the board. The claim was one which the board of trustees had jurisdiction to hear and determine. Such determination was a judicial act, and involved a determination of the fact of indebtedness, and when so determined, whether right or wrong, its action was binding upon the clerk."

Counsel maintains that the subject of waterworks, street paving, street lighting, terminal facilities, and other municipal matters comes within the control of the city ⁶⁵⁸ council, and that members of the council are bound to use their best endeavors in behalf of the taxpayers, by giving them the best results in the most economical manner, and that it is the duty of councilmen to inform themselves concerning all matters which come before them, that they may act intelligently for the benefit of the city. It is true the members of the city council owe the public duty to the city to exercise their best faculties in its interest. The compensation of a member for his official duties as councilman may be determined and fixed, and cannot be changed during his incumbency of office. If the members of the council, upon their tour of inspection, were in the discharge of their official duties, the restriction upon additional compensation applies: *Tacoma v. Lillis*, 4 Wash. 797, 31 Pac. 321.

The only ground, then, upon which compensation could be sustained, would be that of necessary expenses incurred in the performance of official duties. Necessary expenses must be such as are strictly essential to municipal purposes. This principle is well established: 1 *Dillon on Municipal Corporations*, 4th ed., secs. 89-91; 19 *Am. & Eng. Ency. of Law*, 541.

Judge Cooley, in his work on *Taxation*, page 209, observes: "In the construction of any grant of the power to tax made by the state to one of its municipalities, the rule which is accepted by all the authorities is, that it should be with strictness. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all it has intended to grant at all; and whatsoever authority the municipal officers assume to exercise, they must be able to show the warrant for in the words of the grant."

And we think the rule thus announced is the established one, and in consonance with all sound authority. The members of the city council are trustees. The body holds ⁶⁵⁹ a trust for the inhabitants of the city. The terms of the trust are

fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power. Where this authority does not exist, the council is without power to authorize the payment of the claim against the city; and, upon sound principle, it cannot be conceded that the council had the power to authorize the payment of the claim of appellant.

To the objection that the comptroller cannot defend against the suit, it is sufficient answer that the other principle has been established by this court: *Chalk v. White*, 4 Wash. 156, 29 Pac. 979. Where the council is without power to authorize the payment of the claim, the officer may properly refuse to countersign the warrant directing the payment of such claim.

The judgment is affirmed.

Dunbar, C. J., and Fullerton, J., concur.

Anders, J., not sitting.

MUNICIPALITY.—THE ALLOWANCE OF CLAIMS AGAINST a municipality, not authorized by law, imposes upon its officers no duty, nor vests them with any authority, to make payment thereof: See the monographic note to *Commissioners v. Heaston*, 55 Am. St. Rep. 208, 209.

MUNICIPAL CORPORATION—EXPENSE OF OFFICERS.—A municipal corporation may indemnify an officer acting in good faith for a loss incurred in the discharge of his official duty, but the duty must have been one authorized or imposed by law, or the matter one in which the corporation had an interest: *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 485. As illustrating this principle, see *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648; *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52.

STANDARD FURNITURE COMPANY v. VAN ALSTINE.

[22 Wash. 670, 62 Pac. 145.]

CONTRACT AGAINST PUBLIC POLICY.—A conditional sale of goods for use in a house of ill-fame, with knowledge on the part of the vendor of the use to which the goods are to be put, is a contract opposed to public policy and void.

CONTRACTS OPPOSED TO PUBLIC POLICY — ESTOPPEL.—A contract prohibited by law or morality is void as against public policy, and the doctrine of estoppel does not apply thereto.

G. E. Aust and Osborn & Steele, for the appellant.

Ballinger, Ronald & Battle, and R. Winson, for the respondent.

⁶⁷¹ FULLERTON, J. This is an action brought by the appellant, a domestic corporation, for the recovery of certain furniture and house furnishing goods. The complaint ⁶⁷² was, in form, that commonly used in this state for the recovery of personal property in specie. The respondent, who was defendant below, after denying the allegations of ownership and right of possession of the property in appellant contained in the complaint, pleaded affirmatively that the appellant claimed title to the property by virtue of a certain agreement in writing by which two certain women purchased the property and agreed to pay appellant therefor, but without further description as to the character of the agreement. He then pleaded the recovery of a judgment by himself against the purchasers named in the agreement, the issuance of an execution thereon, the seizure and sale of the property under the writ of execution, and his purchase of the property and its delivery to him at the execution sale. He pleaded further that the vendees were, at the time of the execution of the written agreement and the delivery of the property by the appellant to them, the keepers of a house of ill-fame in the city of Seattle; that the appellant had knowledge at the time the agreement was entered into, and at the time the goods were delivered, that the vendees were the keepers of a house of ill-fame, "and that the said goods so delivered and said written agreement aforesaid, were to aid and enable the said" vendees "to carry on and conduct a house of prostitution; . . . and that any sum remaining unpaid on account of said goods, if any did remain, was to be paid by said" vendees to the appellant "out of the earnings of said house of prostitution." The appellant, in reply, admitted the judgment, levy, and sale, and that it claimed title by virtue of a conditional contract of sale, but denied the other allegations of the affirmative answer. It then pleaded affirmatively the conditions of the contract under which the sale of the property was made, showing it to be a conditional sale, with "title, ownership, and possession of the property" reserved in itself until the purchase ⁶⁷³ price should be paid; with the right, also, to "take possession of the aforesaid personal property whenever it may deem itself insecure, even before maturity" of the deferred payments; that the purchase price was to be paid in monthly installments of one hundred and fifty dollars each, and that title should pass to the vendees when the last installment should be paid; alleged a breach on the part of the vendees of the conditions of the contract, that the respondent had refused to perform

the same, and its election to declare the contract forfeited. It then alleged, by way of estoppel, that the notice given of the execution sale at which the respondent purchased expressly recited that the property was to be sold subject to the contract of sale between the appellant and its vendees, that the officer conducting the sale orally proclaimed that fact at the time he offered the property for sale, and that the sale was actually so made. At the trial, after the appellant had introduced its evidence and rested its case, the respondent called the president of the appellant and proceeded to examine him touching the affirmative matter alleged in his answer not admitted by the reply. Before the examination of the witness was concluded, the court announced that the evidence was sufficient to warrant the court in holding that the contract was void as against public policy. He thereupon refused to permit the appellant to offer proofs on the matter alleged in the reply as an estoppel, took the case from the jury, and entered judgment in favor of the respondent.

It is urged on behalf of the appellant that the evidence before the trial court upon which it based its judgment showed, at most, nothing more than that the appellant, at the time it entered into the contract of conditional sale and delivered the property to the vendees named therein, had knowledge that the vendees intended to put the property to an unlawful use; and that this fact is not sufficient ⁶⁷⁴ to justify the trial court in its holding that the contract was void as against public policy.

It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of a vendor of goods that the vendee designs to and will put them to an immoral or illegal use, is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention, the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property was complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor. On the other hand, it is held by all of the cases, even those which announce the rule contended for by the appellant, that

if the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover: *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Aiken v. Blaisdell*, 41 Vt. 665; *Schankel v. Moffatt*, 53 Ill. App. 382; *Ralston v. Boady*, 20 Ga. 449; *Webster v. Munger*, 8 Gray, 584; *Adams v. Coulliard*, 102 Mass. 167; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, and note to this case in 32 Am. St. Rep. 450; *Beach's Modern Contract Law*, sec. 457.

⁶⁷⁵ And there are cases which hold that knowledge on the part of the vendor that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the supreme court of the United States in *Hanauer v. Doane*, 12 Wall. 342, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only *malum prohibitum*, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime, such as treason, as was the fact in that case: See, also, *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Milner v. Patton*, 49 Ala. 423; *Lewis v. Latham*, 74 N. C. 283; *Bickel v. Sheets*, 24 Ind. 1; *Steele v. Curle*, 4 Dana, 381.

Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must, nevertheless, use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer forfeiture of his contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not

only reserved "title, ownership, and possession of the property," but reserved the right to "take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity" of the deferred ⁶⁷⁶ payments. This practically left the control of the use of the property with the appellant; and, as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use. The distinction between knowing that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vendor, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts. It must be borne in mind that at common law it was an indictable offense to keep a house of ill-fame, or to let a house knowing it was to be used for the purpose of prostitution: Wharton's Criminal Law, sec. 1459; that in this state these acts are made misdemeanors by statute: Ballinger's Code, secs. 7239, 7261; and that "any contract auxiliary to the keeping of a bawdy-house, or otherwise encouraging prostitution, is void": Bishop on Contracts, sec. 506; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294; Chateau v. Singla, 114 Cal. 91, 55 Am. St. Rep. 63, 45 Pac. 1015; Beach's Modern Contract Law, sec. 1443.

We are aware that the appellant, though it admits that it had knowledge at the time it entered into the contract that its vendees were prostitutes, and that the house where they lived and where the goods were delivered was in a section of the city known as "the Tenderloin" district, contends that the evidence fails to show that it had knowledge that the house was kept as a house of ill-fame. A ⁶⁷⁷ perusal of the entire record, however, does not leave this question in doubt. Nor was there such a substantial conflict in the evidence thereon as to compel the trial court to submit the question to the jury.

It is further contended that the trial court erred in refusing to permit the appellant to offer proofs of the matter alleged in the reply by way of estoppel, but in this we find no error. No principle of law is better settled than that a contract pro-

hibited by law or morality is void as against public policy. It is because of the public interest, and not the desire to aid the defendant, that the courts refuse to enforce such a contract, and hence the doctrine of estoppel has no application: *Greenhood's Public Policy*, rule 126, and illustrations there given; *Beach's Modern Contract Law*, sec. 1499; *Turnbull v. Farnsworth*, 1 Wash. Ter. 444; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093.

The judgment is affirmed.

Dunbar, C. J., and Reavis and Anders, JJ., concur.

AN ILLEGAL CONTRACT is void. It creates no obligation between the parties, and cannot form the basis of a judicial proceeding: *Santa Clara etc. Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391. Contracts that contravene the law are void, and courts will never lend their aid to enforce them: *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act: See the monographic note to *Lemon v. Grosskopf*, 99 Am. Dec. 61. A contract of partnership to let apartments for purposes of prostitution is illegal and immoral, and neither partner can maintain an action against the other for an accounting: *Chateau v. Singla*, 114 Cal. 91, 55 Am. St. Rep. 63, 45 Atl. 1015.

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1. **ADVERSE POSSESSION—NAKED POSSESSION.**—Possession, no matter how long continued, is no bar to recovery by the true owner, if the party in possession entered upon the land without any claim of title, did not acquire nor assert title to the land at any time, nor claim to hold it adversely to the true owner. (Baber v. Henderson, 540.)

2. ADVERSE POSSESSION.—MERE NAKED POSSESSION, no matter how long asserted, without claim of right, never ripens into a perfect title by limitation, and to be effective, adverse possession must be hostile to the title of the true owner and under a claim of right. (*Baber v. Henderson*, 540.)

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AFFIDAVIT.

See Attachment, 3; Judgment, 18.

AFFINITY.

1. AFFINITY—DEFINITION.—AFFINITY is the tie between a husband and the blood relatives of his wife, and between a wife and the blood relatives of her husband, but it does not exist between the blood relatives of either party to the marriage and those of the other. (*State v. Wall*, 195.)

2. AFFINITY.—A HUSBAND AND WIFE are not related to each other by affinity, but are regarded, in law, as one person. (*State v. Wall*, 195.)

See Judge, 1, 2; Trial, 1.

AGENCY.

1. AGENCY—GENERAL—IMPLIED POWER.—A CONTRACT of guaranty against loss signed by a person as "general agent" is the individual obligation of the signer, and does not bind the principal in the absence of evidence showing that the agent had such authority. (*Braun v. Hess*, 221.)

2. A GENERAL AGENT of a corporation handling cigarettes and tobacco has no implied power, as a matter of law, to bind the corporation by a contract guaranteeing a purchaser against loss of rebates from another corporation on account of his handling such goods. (*Braun v. Hess*, 221.)

3. PRINCIPAL AND AGENT—CONTRACT—WHEN NOT THAT OF THE AGENT.—If a principal authorizes his agent to sell real property, and a contract is made in the principal's name pursuant to the authorization, he cannot escape liability for a deposit paid thereon on the ground that the contract was that of the agent and not of himself, because it was orally agreed between them that the agent was to have all the purchase money above a sum specified. (*Melone v. Ruffino*, 127.)

4. AGENCY—DEFENSE OF ILLEGALITY OF CONTRACT.—An agent who has sold goods for his principal, collected the proceeds, and refused to turn them over cannot defend against the claim of his principal thereto on the ground that the sales were made without a license, and therefore illegal. (*Hertzler v. Geigley*, 724.)

5. AGENCY—ILLEGALITY OF TRANSACTION AS DEFENSE. If money has been actually paid to an agent for the use of his principal, the legality of the action of which it is the fruit does not affect the right of the principal to recover it. (*Hertzler v. Geigley*, 724.)

6. AGENCY—ILLEGALITY OF CONTRACT AS DEFENSE.—The law cannot enforce an illegal contract, but if the servant or agent of another has, in the prosecution of an unlawful enterprise for his master, received money or other property belonging to the

master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction. (*Hertzler v. Geigley*, 724.)

See Brokers; Physicians.

AMENDMENT.

See Appeal, 8; Judgment, 5, 6.

APOTHECARY.

See Constitutional Law, 12-15.

APPEAL.

1. APPELLATE PRACTICE.—POINTS NOT PRESENTED and passed upon by the trial court cannot be considered on appeal. (*Laclede Nat. Bank v. Richardson*, 528.)

2. APPEAL—REVIEW OF ERRORS—LIMITATION UPON.—An appellate court will consider only those errors which have been assigned by the plaintiff in error. (*Dell v. Marvin*, 171.)

3. APPEAL—WITNESSES.—AN OBJECTION TO A QUESTION propounded to a witness, not insisted upon in the trial court, cannot be considered on appeal. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

4. APPELLATE PRACTICE—EVIDENCE.—The judgment of the trial court in an action at law cannot be reversed on appeal on a question of fact if there is any substantial evidence to support it. (*Moore v. Farmer*, 504.)

5. APPELLATE PRACTICE.—FAILURE OF AN ASSIGNEE of an insurance policy to introduce in evidence an assignment upon which the right to recover part of the insurance is based cannot be reviewed on appeal if the amount of recovery is not assigned as cause for a new trial. (*Supreme Tribe of Ben Hur v. Hall*, 262.)

6. APPEAL—WAIVER OF OBJECTION TO REFUSAL OF PEREMPTORY INSTRUCTIONS.—Where an instruction to return a verdict for the defendant was asked and refused at the close of the plaintiff's testimony, and again at the conclusion of all the evidence, the defendant does not, by submitting its case to the jury on the evidence and instructions as to the law, waive the right to assign error upon the refusal of its peremptory instructions. (*West Chicago St. R. R. Co. v. Liderman*, 226.)

7. APPELLATE PROCEDURE—PRESUMPTION IN FAVOR OF JUDGMENT.—If when an instrument is offered in evidence, it is objected to on the ground that erasures appear in the certificate of acknowledgment, and the objection is overruled, it will be presumed, on appeal, that the court ruled correctly unless the condition of the instrument is disclosed by the record. (*Karcher v. Gans*, 893.)

8. APPELLATE PRACTICE—AMENDMENT OF PLEADINGS. If a complaint is dismissed as to a demurring defendant, and the case proceeds against other defendants to judgment, which is not appealed from, the supreme court cannot remand the case for the amendment of the complaint against such dismissed defendant. (*De Laney v. Georgia etc. Ry. Co.*, 843.)

9. PRACTICE.—THE FINDINGS OF A REFEREE OR OF A COURT will not be disturbed by the appellate court unless they are clearly against the preponderance of the evidence. (*Custer County v. Tunley*, 870.)

10. APPEAL—UNDERTAKING NOT CONFORMING WITH THE STATUTE—ENFORCEMENT OF AS A COMMON-LAW OBLIGATION.—Though the statute requires that an undertaking on appeal from a judgment for the delivery of personal property to stay execution shall be, in effect, that the appellant will obey the order of the appellate court on appeal, yet, if an undertaking is given which, instead of this condition, contains one that the appellant, if the judgment is confirmed, will pay the amount directed to be paid by such judgment, and the undertaking is not questioned, and the respondent refrains from taking out any execution or otherwise enforcing his judgment on the assurance that the appeal would be taken and a sufficient bond furnished, the bond so given is a good common-law obligation, and recovery may be had of the sureties to the same extent as if it had contained the provision required by the statute. (*Coughran v. Sundback*, 886.)

ASSIGNMENT.

See Insurance, 9; Mortgage, 8, 9; Wages.

ASSIGNMENT FOR CREDITORS.

See Trusts, 3, 4.

ASSOCIATION.

ASSOCIATIONS—BENEFIT SOCIETY.—THE WORD "SICKNESS," as used in the by-laws of beneficial societies, relating to sick benefits, includes mental alienation or insanity. (*Robillard v. Societe etc.*, 806.)

See Insurance, 10-17.

ATTACHMENT.

1. ATTACHMENT, FOREIGN—EFFECT OF DEATH OF DEFENDANT.—The death of the defendant in a foreign attachment before final judgment against him is obtained works a dissolution of the attachment. (*Reynolds v. Nesbitt*, 736.)

2. ATTACHMENT AGAINST NONRESIDENTS—JURISDICTION.—THE AFFIDAVIT required by statute as a prerequisite to the issuance of a writ of attachment against a nonresident is jurisdictional, and if none is filed, or if one is filed which wholly fails to set out some fact made essential by the statute, no writ can lawfully issue. (*Duxbury v. Dahle*, 408.)

3. ATTACHMENT AGAINST NONRESIDENTS—JURISDICTION--DEFECTIVE AFFIDAVIT.—Under a statute which requires the affidavit for a writ of attachment against a nonresident to specify "the ground" of the plaintiff's claim, there is no jurisdiction to allow the writ where the affidavit wholly fails to state the grounds of such claim. (*Duxbury v. Dahle*, 408.)

4. ATTACHMENT AGAINST NONRESIDENTS—COLLATERAL ATTACK.—If a writ of attachment is issued upon an affidavit which fails to state the ground of the plaintiff's claim, the same and all subsequent proceedings are void, where the defendant fails to appear; and where the complaint shows such defect in the affidavit, it affirmatively appears that the proceedings were void, and they may, therefore, be collaterally attacked. (*Duxbury v. Dahle*, 408.)

5. ATTACHMENT—GARNISHMENT—SURPLUS PROCEEDS OF SALE—CUSTODY OF THE LAW.—A BALANCE of the pro-

ceeds of a sale of attached, perishable, personal property, remaining in the custody of the clerk of the court, after an execution in favor of the plaintiff has been satisfied, is not subject to garnishment or attachment by trustee process, by one of the defendant's creditors, as such balance, being still in the registry of the court, is in the custody of the law. (*Allen v. Gerard*, 816.)

6. MUNICIPAL CORPORATIONS ARE NOT SUBJECT TO PROCESS OF GARNISHMENT, nor to suit by creditors' bills. (*Geist v. St. Louis*, 545.)

7. MUNICIPAL CORPORATIONS—GARNISHMENT.—If judgment has been rendered against a municipal officer upon which execution has been issued and returned nulla bona, the municipality cannot be compelled to pay the salary due such officer to his judgment creditor, either by process of garnishment, or by suit against such officer and the municipality. (*Geist v. St. Louis*, 545.)

ATTORNEY AND CLIENT.

1. ATTORNEYS AT LAW ARE NOT ENTITLED TO ANY PAY for their services, where they have been guilty of actual fraud or bad faith toward their clients in the matter of their employment. (*Davis v. Swedish-American Nat. Bank*, 400.)

2. ATTORNEY AND CLIENT—CONTROL OF ACTION—STIPULATION SIGNED BY PARTY.—A party must be heard in court through his attorney, when he has one, and the court has no authority to recognize anyone in the conduct or disposition of the case except the attorneys of record. Hence a judgment of dismissal entered upon a stipulation signed by the plaintiff alone should be set aside upon motion of the plaintiff's attorneys. (*Toy v. Haskell*, 70.)

ATTORNEY'S FEE.

See Attorney and Client, 1; Mechanic's Lien.

BANKRUPTCY.

BANKRUPTCY—RIGHT OF TRUSTEE TO CONTINUE ACTION AFTER HIS DISCHARGE.—If an action is rightfully brought by a trustee in bankruptcy, it may be prosecuted by him or in his name after he is discharged, and the estate closed up for the benefit of the bankrupt and with his consent. (*Stone v. Jenkins*, 343.)

BANKS AND BANKING.

1. BANKS AND BANKING—FORGED CHECKS—LIABILITY FOR PAYING.—Generally, a bank is not bound to know the signature of the indorser of a check, and if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid if it proceeds promptly on the discovery of the fraud. But in order for the bank to recover, it must appear that it has sustained a loss, and if it can charge the payment to the account of the depositor, it has lost nothing, and has no cause of action. (*Land Title etc. Co. v. Northwestern Nat. Bank*, 717.)

2. BANKS AND BANKING—PAYMENT OF FORGED CHECK—LIABILITY.—A bank is not liable for the payment of a check on a forged indorsement when the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. (*Land Title etc. Co. v. Northwestern Nat. Bank*, 717.)

3. BANKS AND BANKING—FORGED CHECKS—RIGHTS OF PARTIES.—The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank paying his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check arises from his implied warranty of the indorsement, and is founded on contract, and not on negligence. (*Land Title etc. Co. v. Northwestern Nat. Bank*, 717.)

See Setoff, 1-3.

BARBER.

See Constitutional Law, 11.

BENEFIT SOCIETY.

See Association; Insurance, 10-17.

BETTERMENTS.

1. BETTERMENTS—ESSENTIALS TO RECOVERY.—Under the South Carolina betterments act, Revised Statutes, chapter 64, article 4, it is incumbent on the plaintiff who has been ousted from possession to show, in order to recover, not merely the value of his improvements, but he must also present evidence from which the jury can find a special verdict, stating the value of the land with the improvements, and its value without them. And evidence tending to show that improvements of some considerable value have been put on the land does not warrant sending the case to the jury nor save a nonsuit. (*Hall v. Boatwright*, 864.)

2. BETTERMENT LAWS recognize the existence of an equitable right and give a remedy for its enforcement where none existed before. (*Hall v. Boatwright*, 864.)

See Cotenancy, 4, 5.

BICYCLE.

See Highway.

BILLBOARD.

See Municipal Corporation, 2-5.

BLASTING.

See Master and Servant, 9.

BOND.

See Appeal, 10; Municipal Corporation, 17-22; Officer, 1-6; Suretyship.

BOYCOTT.

CONSPIRACY—BOYCOTTING.—A complaint alleging that plaintiff had a profitable business, and that defendants conspired to refuse to deal with him, and to induce others not to deal with him, whereby his business has been ruined, states a cause of action for damages, if it appears that such interference with his business did not serve any legitimate purpose, but was done maliciously to injure him. (*Ertz v. Produce Exchange*, 433.)

BROKER.

1. **BROKERS—COMMISSIONERS—SALE OF REAL ESTATE.**—A real estate broker employed to find a purchaser for land is bound to disclose to his principal any facts known to him material to the transaction, and if he takes part in the negotiation, he is bound to exert his skill for the benefit of his principal; otherwise he is not entitled to commissions. (*Wilkinson v. McCullough*, 702.)

2. **BROKERS—COMMISSIONS—REAL ESTATE SALES.**—If a real estate broker conceals from his principal the name of the purchaser procured by him, and also that such purchaser has bought an adjoining parcel of land, for the purpose of preventing his principal from raising his price, he does not act in good faith, and is not entitled to commissions. (*Wilkinson v. McCullough*, 702.)

3. **BROKER'S RIGHT TO COMMISSIONS FOR AN EXCHANGE OF LANDS PREVENTED BY A DEFECT OF TITLE.** If a broker is employed to effect an exchange of lands, and reports an exchange to his employer, which is accepted by the latter, and a written agreement for the exchange entered into between him and the other supposed land owner, but the exchange falls because of a defect in the latter's title, the broker is entitled to his commissions. The remedy of his employer is by an action against the other party to the agreement of exchange to recover for damages for the loss of the bargain. (*Roche v. Smith*, 345.)

CARRIER.

See Railroad.

CAVEAT EMPTOR.

See Judicial Sale, 4.

CHATTEL MORTGAGE.

CHATTEL MORTGAGES—CROPPING CONTRACTS.—A contract for the cultivation of a farm on shares providing that the land owner reserves the title to the cropper's share of the crop raised for advances made by him is in effect a chattel mortgage, in so far as it is security for such advances and, to be valid against subsequent mortgagees, purchasers, or attaching creditors, must be filed for record as provided by statute. (*McNeal v. Rider*, 437.)

CHECK.

See Banks and Banking, 1-3; Negotiable Instruments.

CITIZENSHIP.

JUDGMENTS—NATURALIZATION OF MINORS—COLLATERAL ATTACK.—A judgment of a court of competent jurisdiction naturalizing a minor, though erroneous, is not void, and cannot be collaterally attacked, but can be annulled or set aside only by appeal or writ of error. (*State v. Brandhorst*, 538.)

CIVIL SERVICE.

See Constitutional Law, 6.

COAL MINING.

See Trespass, 1, 2.

COLLATERAL ATTACK.

See Attachment, 4; Citizenship; Corporations, 3, 4; Executor and Administrator, 10, 11; Judgment, 14-16.

COMMISSION.

See Brokers.

CONDITION SUBSEQUENT.

See Deeds, 4, 5.

CONDITIONAL SALE.

See Sales, 3-5.

CONFLICT OF LAWS.

See Attachment, 1-4; Corporations, 14-16; Game Laws, 1, 2; Negligence, 15.

CONSPIRACY.

See Boycott.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—TITLE OF STATUTE.**—The generality of the title of a statute constitutes no constitutional objection to its validity, if such title is sufficient to give notice of the general subject of the proposed legislation and of the interests likely to be affected. (*Crookston v. County Commissioners*, 453.)

2. **CONSTITUTIONAL LAW—TITLE OF STATUTE.**—A statute creating a municipal corporation, and granting to it legislative, judicial, police, taxing, and other ordinary powers, embraces but one subject, and the separate provisions of the act covering these powers generally, as well as in detail, are simply parts of the whole, and absolutely essential to make a whole. The details of such powers are not required to be set forth in the title of the act. (*Crookston v. County Commissioners*, 453.)

3. **STATUTES—EXPRESSION OF SUBJECT IN TITLE.**—**FIREMEN** are not included in the title of "an act providing for the protection of employes." The act, as thus limited, under a constitution requiring the subject of the act to be expressed in its title, is one exclusively for the protection of employes. (*Hamilton v. Minneapolis Desk Mfg. Co.*, 350.)

4. **CONSTITUTIONAL LAW—RESTRICTION TO STATE BOUNDARIES.**—While the legislative power is, for most purposes, territorial, there is no doubt that it may confer rights upon alien nonresidents. (*Mulhall v. Fallon*, 309.)

5. **CONSTITUTIONAL LAW.—IN INTERPRETING A CONSTITUTION** it is to be construed as a whole, complete in itself. Force is to be given to every provision contained in it, and each clause explained and qualified by every other. The words must be presumed to have been employed in their natural and ordinary meaning, and if different provisions seem to be in conflict, they must be harmonized if possible, and that construction adopted which will render every other provision operative, rather than one which will make some idle or nugatory. (*People v. Mosher*, 552.)

6. CONSTITUTIONAL LAW—CIVIL SERVICE—MAKING AN APPOINTMENT DEPEND UPON AN EXAMINATION.—

Where a state constitution provides that city officers shall be elected by the electors and appointed by such authorities as the legislature shall designate for that purpose, the power of the municipal authorities to make appointments cannot be changed by statute into a mere ministerial authority of appointing such persons as shall, as the result of a competitive examination, be reported to them as best qualified. This remains true though the same constitution declares that appointments and promotions in the civil service of the state, including cities and villages, shall be according to merit and fitness, to be ascertained, so far as practicable to do so, by examinations which, so far as practicable, shall be competitive. (*People v. Mosher*, 552.)

7. CONSTITUTIONAL LAW—TAKING OF PROPERTY FOR PRIVATE PURPOSES.—The sovereign power is incapable of conferring any right to interfere with private property except for public objects, and the right to do so cannot be conferred by an amendment to the constitution. (*Matter of Tuthill*, 574.)

8. CONSTITUTIONAL LAW—DRAINAGE OF PRIVATE PROPERTY.—A constitutional amendment declaring that general laws may be passed permitting owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches, and dikes on the lands of others, under proper restrictions and with just compensation, is itself unconstitutional, because in conflict with the provisions of the fourteenth amendment to the national constitution. (*Matter of Tuthill*, 574.)

9. CONSTITUTIONAL LAW—STREET ASSESSMENTS PROPORTIONATE TO THE FRONTAGE.—A statute which requires all expenses incurred in the making of a sewer in a public highway to be assessed to each parcel in proportion to the number of lineal feet which each measures on such highway is unconstitutional, because under such assessment some of the parcels may be assessed for less and others for more than the benefits received. (*Dexter v. Boston*, 306.)

10. CONSTITUTIONAL LAW.—THE ACTUAL EFFECT OF A STATUTE in cases wherein its constitutionality is assailed is not material. It is sufficient that the statute according to its terms will violate the provisions of the constitution in its application to cases which may be expected to arise. (*Dexter v. Boston*, 306.)

11. CONSTITUTIONAL LAW—REGULATION OF TRADE OR PROFESSION.—In the exercise of the police power in the interest of public health and welfare, it is competent for the state legislature to enact a law prohibiting persons from practicing the calling of a barber without first obtaining a license or certificate of registration. (*State v. Zeno*, 422.)

12. CONSTITUTIONAL LAW—PHARMACY ACT—ARBITRARY POWER.—A law which invests any board with a discretion which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid, since it makes an unjust discrimination between persons coming within the same class. Hence, a statute is invalid which authorizes a board of pharmacy to issue permits to persons engaged in business in a village or other locality to sell domestic remedies and proprietary medicines, provided such board sees fit in its discretion to issue such permit. (*Noel v. People*, 238.)

13. CONSTITUTIONAL LAW—PHARMACY ACT—LEGISLATURE DELEGATING POWER.—The legislature may, in the in-

terest of the public health, regulate the sale of domestic remedies and proprietary medicines, but it cannot delegate such functions to a board or officials by a law conferring arbitrary and discretionary power upon such statutory officials. (*Noel v. People*, 238.)

14. CONSTITUTIONAL LAW—POLICE POWER—PHARMACY ACT—EXCLUSIVE PRIVILEGE.—While the legislature may, under the police power, pass laws for the benefit and protection of the public health, a statute has no such tendency which confers upon registered pharmacists the exclusive right to sell patent and proprietary medicines without requiring them to make any inspection of the same, and such statute is invalid as conferring a special power in violation of a provision of the constitution prohibiting special legislation. (*Noel v. People*, 238.)

15. CONSTITUTIONAL LAW—PHARMACY ACT—STATUTE PART VALID.—Where a statute attempts to accomplish two or more objects, and is void as to one, it may still be valid as to the other. Hence, a pharmacy act, while void as to its prohibition of the sale of patent and proprietary medicines and domestic remedies by any other person than a registered pharmacist, is valid as to a prohibition of the compounding of medicines and the sale of the same as compounded by a person other than a registered pharmacist. (*Noel v. People*, 238.)

16. LEGISLATURE—MAKING ACT CRIMINAL.—The legislature, acting within constitutional limitations, has power to make penal an act theretofore indifferent or even innocent. (*Ex parte Lorenzen*, 47.)

17. CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE RESTRICTING HOURS OF LABOR.—A municipal ordinance making it unlawful for any contractor upon any public work to require or permit any day laborer or mechanic to work more than eight hours in any one calendar day is unconstitutional, as interfering with the right of persons to contract with reference to compensation for their services, neither unlawful nor against public policy. (*Seattle v. Smyth*, 939.)

See *Executor and Administrator*, 13, 14; *Mechanic's Lien*, 2; *Municipal Corporation*, 6-8; *Taxation*, 1-3.

CONTRACT.

1. CONTRACTS — CONSTRUCTION — UNAMBIGUOUS TERMS.—It is only in relation to contracts that are uncertain and ambiguous that the conduct of the parties is to be looked to in aid of construction, and where the terms are plain and certain, the court will construe the intention of the parties to have been in accordance with their agreement. (*Pierce v. Merrill*, 56.)

2. CONTRACT—VARIANCE BETWEEN AND THE AUTHORITY GIVEN TO MAKE IT.—Variances between an authority given to sell real property and a contract of sale made by the agent thereunder are immaterial, if such contract was printed on the back of the authorization, and the two constitute but one instrument, and from both it is clear that all the parties had reference to the same property. (*Melone v. Ruffino*, 127.)

3. CONTRACTS — PAINTING PORTRAITS — AGREEMENT THAT WORK SHALL BE "SATISFACTORY."—If the subject of a contract, such as one to paint a pastel portrait, involves personal taste or feeling, an agreement that it shall be "satisfactory" to the buyer necessarily makes him the sole judge whether it answers that condition. (*Pennington v. Howland*, 774.)

4. **CONTRACTS—AGREEMENT THAT WORK SHALL BE “SATISFACTORY”—DISTINCTION.**—If the subject matter of a contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, salability, and other like considerations, rather than to personal satisfaction, as in a contract for the painting of a portrait, an agreement that it shall be “satisfactory” means that it shall be “reasonably satisfactory.” (*Pennington v. Howland*, 774.)

5. **CONTRACTS—ACCEPTANCE OF WORK.—THE RETENTION** of the subject matter of a contract, such as portrait paintings, is not conclusive upon the question of acceptance, which should be left to the jury. (*Pennington v. Howland*, 774.)

6. **PART PERFORMANCE—RECOVERY FOR WHEN COMPLETE PERFORMANCE BECOMES IMPOSSIBLE.**—One engaged to make repairs or do other work on the house of another under a special contract, when the completion of his contract becomes impossible on account of the destruction of the house without his fault, may recover for what he has done. (*Angus v. Scully*, 318.)

7. **CONTRACTS MADE UNDER THE INFLUENCE OF OPiates—AVOIDANCE OF.**—In the absence of fraud, it is not enough, to avoid a contract, that the person making it was under the influence of opiates and not in possession of his full mental powers. A contract made under these circumstances is merely voidable and is binding, where it is fair, and was made with one ignorant of the other's condition as affected by opiates or lack of mental capacity, and where it has been executed, so that the parties cannot be restored to their former position. (*Cooney v. Lincoln*, 799.)

8. **CONTRACTS OPPOSED TO PUBLIC POLICY—ESTOPPEL.**—A contract prohibited by law or morality is void as against public policy, and the doctrine of estoppel does not apply thereto. (*Standard Furniture Co. v. Van Alstine*, 960.)

9. **CONTRACTS—ILLEGALITY—DEFENSE.**—An illegal contract cannot be executed, but when it has in fact been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. (*Hertzler v. Geigley*, 724.)

CORPORATION.

1. **CORPORATIONS—DEFINITION—CORPORATE STOCK.**—A corporation is an entity, an existence, irrespective of the persons who own its stock, and the fact that one person owns all of the stock does not make him and the corporation one and the same person. (*Monongahela Bridge Co. v. Pittsburg etc. Co.*, 685.)

2. **CORPORATIONS—STOCK.**—Shares of stock in a corporation constitute a species of property entirely distinct from the corporate property, and a shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it. Such shares represent a right to participate in profits only. (*Monongahela Bridge Co. v. Pittsburg etc. Co.*, 685.)

3. **CORPORATIONS—COLLATERAL ATTACK ON CHARTER.**—The existence of a corporation or its right to exercise its corporate franchises cannot be inquired into or attacked collaterally. (*Monongahela Bridge Co. v. Pittsburg etc. Co.*, 685.)

4. CORPORATIONS.—UNTIL JUDICIALLY DETERMINED In a proper proceeding, the corporate existence of a corporation cannot be denied so as to prevent the corporation from exercising its franchises and enforcing its contracts. (*Monongahela Bridge Co. v. Pittsburg etc. Co.*, 685.)

5. CORPORATIONS.—THE PROPER OFFICE OF BY-LAWS is to regulate the transaction of the incidental business of a corporation. They should not affect rights of property or create obligations unknown to the law. (*Ireland v. Globe Milling Co.*, 769.)

6. CORPORATIONS—BY-LAWS—RESTRICTING TRANSFER OF STOCK.—A majority of the shareholders of a corporation have no right, under the form of a by-law, to impose restrictions upon a minority in the free transfer of their stock which are not specially authorized by statute or charter, or which are not reasonably necessary to the business of the corporation. (*Ireland v. Globe Milling Co.*, 769.)

7. CORPORATIONS.—BY-LAWS MAY BE PASSED by a corporation on subjects not specially mentioned in the statute governing it so far as they relate to the regulation of its affairs; but it cannot go beyond this and restrict the private right of a shareholder to dispose of his stock. (*Ireland v. Globe Milling Co.*, 769.)

8. CORPORATIONS—RESTRICTING TRANSFER OF STOCK. A BY-LAW which seeks to impose a personal obligation, not specified in the statute governing a corporation and not otherwise authorized by law, is not authorized by a statute providing that it may make by-laws consistent with the laws of the state and of its charter. Hence, a by-law restricting a shareholder's right to transfer his stock without first offering it to the corporation for a period of thirty days is invalid. (*Ireland v. Globe Milling Co.*, 769.)

9. CORPORATIONS—ASSENT TO UNAUTHORIZED BY-LAW—EFFECT OF, UPON TRANSFER OF STOCK.—Although a shareholder in a corporation assents to a by-law not authorized by statute, and subsequently transfers his stock, such transfer can only have the effect of a contract by, and enforceable against, the assignor. The assignee is not bound by it by virtue of the assignment alone. (*Ireland v. Globe Milling Co.*, 769.)

10. CORPORATIONS—WRONGFUL USE OF CORPORATE NAME.—Although a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another. (*Armington v. Palmer*, 786.)

11. CORPORATIONS — PURCHASE — CORPORATE NAME.—A purchase of the plant, machinery, stock, and visible property of a manufacturing corporation does not carry the name of the corporation to the company which purchases the property. (*Armington v. Palmer*, 786.)

12. CORPORATIONS—PURCHASE—VOTING USE OF NAME.—If persons purchase the property of a corporation, and form a new company, with a new name closely resembling the name of the old corporation, which is still in existence and has assets, a purely voluntary vote by stockholders of the old company, without consideration, and giving to the new company the right to the name chosen by it, is of no effect, as against a minority who do not consent. A majority cannot give away the rights of a minority. (*Armington v. Palmer*, 786.)

13. CORPORATIONS—INJUNCTION AGAINST USE OF NAME—NEW NAME.—To restrain the wrongful assumption of a name by a corporation is not to annul the corporation, by depriving it of a name. If restrained from using a name chosen, it may, under the statute, choose another name. (*Armington v. Palmer*, 786.)

14. CORPORATIONS, FOREIGN—CONFLICT OF LAWS.—The obligation of a stockholder in a foreign corporation is to be measured as to its extent and character by the law of the state where the corporation is organized. (*Ball v. Anderson*, 693.)

15. CORPORATIONS, FOREIGN—CONFLICT OF LAWS—FORCE OF DECISION.—If the supreme court of a state under whose laws a foreign corporation is organized has construed such laws upholding the right of a creditor of the corporation to proceed directly against a stockholder, the courts of another state are bound by such decision on a similar question, although such decision is contrary to a decision of the latter state previously rendered, and although after plaintiff's right has accrued the law of such foreign state has been changed, taking away such right of the creditor. (*Ball v. Anderson*, 693.)

16. CORPORATIONS, FOREIGN—RIGHT OF SETOFF.—In a suit by a creditor of a foreign corporation against a stockholder, the latter may set off the indebtedness of the corporation to him, and may prove that the creditor has proceeded against other stockholders in the state where the corporation was organized, and may have collected all, or at least a part, of his claim. (*Ball v. Anderson*, 693.)

COSTS.

A JUDGMENT FOR COSTS AND DISBURSEMENTS IS THE PROPERTY of the party recovering it, and not of his attorney, though the latter has a lien thereon for his services. Hence, an assignee for the benefit of creditors is properly charged with the amount of such a judgment collected by his attorneys. (*Davis v. Swedish-American Nat. Bank*, 400.)

COTENANCY.

1. COTENANCY—PURCHASE OF OUTSTANDING TITLE.—The rule that the purchase of an outstanding title of one cotenant inures to the benefit of another does not apply when the deed claimed to create the cotenancy does not convey any title. (*Sweetland v. Buell*, 676.)

2. COTENANCY—OUSTER—ADVERSE POSSESSION.—If a cotenant assumes to sell and convey the entire estate, apparently doing so, and his grantee assumes to take it and goes into possession, the possession thus held by him may be treated as an ouster of the cotenants, and constitute adverse possession. (*Sweetland v. Buell*, 676.)

3. COTENANCY—CROPPING CONTRACT.—Under a contract for the cultivation of a farm on shares providing that the land owner reserves the cropper's share of the crop, as security for advances made by him, the parties to the contract are, until division, tenants in common of the crop. (*McNeal v. Rider*, 437.)

4. COTENANCY—RIGHT TO INVOKE BETTERMENT LAWS. Since betterment laws are intended to give a remedy where none existed before, their provisions cannot be invoked by, and they do not apply to, a cotenant who, believing himself the sole owner, has made improvements upon the common property, as he has ample relief by being allotted, on partition, the portion im-

proved by him, or in case of sale, by having allotted to him the increased purchase price by reason of the improvement. Betterment statutes do not give cumulative remedies to cotenants. (Hall v. Boatwright, 864.)

5. **COTENANCY—BETTERMENTS.**—After judgment against a cotenant in partition, he cannot invoke the provisions of a betterment statute to the effect that after final judgment in favor of plaintiff in "an action to recover lands and tenements" the defendant, in certain cases, is entitled to maintain an action to recover for improvements put upon the land. An action for partition is not an action to recover lands in the sense of such statute. (Hall v. Boatwright, 864.)

6. **COTENANCY—LIABILITY FOR ROCK QUARRIED.**—A cotenant in possession who, without the authority or consent of his cotenants, quarries rock from the premises, crushes it, and sells it at a large profit, retaining the proceeds, is liable to account to his cotenants for the rock thus taken. Such rock is not the product of the land, but part of the land itself, and to the extent that it is taken operates as a diminution of the estate. (Cosgriff v. Dewey, 620.)

See Ejectment, 1-3.

COUNTY COURT.

See Jurisdiction.

CREDITOR'S BILL.

See Attachment, 6.

CRIMINAL LAW.

CRIMINAL LAW—PUNISHMENT.—When the primary penalty imposed for a crime is a fine and costs of prosecution only, an imprisonment for the nonpayment of such fine and costs should be in the county jail instead of in the state penitentiary. (Dean v. State, 186.)

See Constitutional Law, 16.

CROPPING CONTRACT.

See Chattel Mortgage; Cotenancy, 3; Partnership, 1.

CROSS-EXAMINATION.

See Witness, 3.

CUSTOM.

CUSTOM—EVIDENCE OF—CONTRACT FOR REBATES.—It is not error to refuse to allow proof of a custom among agents of cigarette manufacturers to make contracts for rebates, where the purchaser does not rely upon such custom but upon the statement of the agent that he had obtained authority from his principal to make such contract. (Braun v. Hess, 221.)

DAMAGES.

1. **DAMAGES—ACTION BY WIDOW FOR DEATH OF HUSBAND—MENTAL ANGUISH.**—In an action by a widow to recover damages for the death of her husband, caused by the alleged negli-

gence of the defendant, she is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the injury. (Florida etc. R. R. Co. v. Foxworth, 149.)

2. DAMAGES—PROPER ELEMENTS OF, IN ACTION BY WIDOW FOR DEATH OF HUSBAND.—In estimating the pecuniary loss sustained by a widow in consequence of the death of her husband caused by the alleged negligence of the defendant, the jury may properly take into consideration her loss of his comfort, protection, and society, in view of his character, habits, and conduct as husband, and of the marital relations between the parties at the time of and prior to his death, his services in assisting her to care for the family, and the loss of support which he was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future, such earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death. All these elements are to be based upon their probable joint lives. She is also entitled to compensation for the loss of whatever she might reasonably have expected to receive in the way of dower or legacies from his estate, in case her life expectancy be greater than his. The sum total of all these elements is to be reduced to a money value, and its present worth to be given as damages. (Florida etc. R. R. Co. v. Foxworth, 149.)

3. DAMAGES—MEASURE OF, FOR NEGLIGENCE CAUSING DEATH—DISCRETION OF JURY.—In an action to recover damages for a death caused by the wrongful act or negligence of the defendant, the jury, in considering the proper elements of damages, may exercise a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in relation to matters of common knowledge and information. (Florida etc. R. R. Co. v. Foxworth, 149.)

4. DEATH, DAMAGES FOR, WHEN BELONG TO NEXT OF KIN.—A statute creating a right of action in favor of the representatives of a decedent who left a husband, wife, or next of kin to maintain an action to recover damages for a wrongful act, neglect, or default, by which decedent's death was caused, against anyone who would have been liable to such decedent, if his death had not ensued, and finding that such damages are to be recovered exclusively for the benefit of such husband, wife, and next of kin, and, when collected, to be distributed as if they were unbequeathed assets left in his hands after payment of all debts and expenses of administration, confers a right to recover for wrongs done to the property rights and interests of another, and not for injuries to the person of the decedent. (Matter of Meekin, 635.)

5. THE AMOUNT OF DAMAGES RECOVERABLE in favor of the husband, wife, and next of kin of a decedent in an action by his personal representative against one wrongfully causing his death depends upon the value of the reasonable expectation of pecuniary benefits from the continuance in life of such decedent to such husband, wife, and next of kin. The damages bear interest from the date of the death. (Matter of Meekin, 635.)

6. NEGLIGENCE—DAMAGES.—In an action to recover for a negligent killing, evidence of damages is not necessary to a recovery. (Mason v. Southern Ry. Co., 826.)

7. REAL PROPERTY—INJURY TO—PERMANENCY.—THE TEST whether an injury to real estate, by the wrongful act of another, is permanent, in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act. (*Bowers v. Mississippi etc. Boom Co.*, 395.)

8. NUISANCE — CONTINUING — SUCCESSIVE SUITS — FORMER JUDGMENT IS NOT A BAR.—If the defendant has placed piling in a river opposite the plaintiff's farm, whereby the water is turned from its natural course and the plaintiff's land is washed away by water, ice, and logs thus turned against it, the obstruction is, as to the plaintiff, a continuing trespass or nuisance, for which successive actions may be brought for damages as they accrue, although the defendant was authorized by law to place and maintain the piling in the river to facilitate the floating and driving of logs therein, and notwithstanding the fact that no part of the piling is on the plaintiff's land. Hence, a judgment recovered for such injuries is not a bar to a subsequent action, brought several years afterward, for like injuries occurring to the land, subsequently to the commencement of the former action. (*Bowers v. Mississippi etc. Boom Co.*, 395.)

See Partnership, 5.

DANGEROUS PREMISES.

See Negligence, 9.

DEATH OF HUMAN BEING.

See Action, 1; Damages, 1-6; Negligence, 12-15.

DEBTOR AND CREDITOR.

DEBTOR AND CREDITOR—CLAIM SECURED BY TWO OBLIGATIONS—ACTION.—A creditor whose claim is secured by two written obligations, one of which is secured by a second mortgage, the other by a pledge of shares of corporate stock, and both of which fall due simultaneously, has a right to proceed at once thereafter upon either or both of them to enforce payment of the amount due. (*Pierce v. Merrill*, 56.)

DECLARATION.

See Evidence, 6-10; Fraudulent Conveyance, 7.

DEDICATION.

1. DEDICATION OF HIGHWAYS—SUFFICIENCY OF ACCEPTANCE OF.—A municipal ordinance directing the construction of a sewer through a strip of land, describing it as Rawson street, is a sufficient acceptance of an offer previously made by the land owner to dedicate such strip as a street. (*Matter of Hunter*, 616.)

2. A DEDICATION CANNOT BE REVOKED AFTER ACCEPTANCE.—An attempt to exercise a power of revoking a dedication of a public street after its acceptance by the city through the erection of fences and like acts is not a revocation, but merely a trespass. (*Matter of Hunter*, 616.)

DEED.

1. **DEEDS—CONSTRUCTION.**—Where there is ambiguity in the terms of a deed, or where the language used has a settled legal meaning, the instrument itself is the only criterion of the intention of the parties. (*Butterfield v. Sawyer*, 246.)

2. **DEEDS—PRESUMPTION OF DELIVERY.**—The fact that deeds are recorded raises the presumption that they were recorded by the grantee, and is *prima facie* and presumptive evidence of delivery. (*Sweetland v. Buell*, 676.)

3. **JUDGMENTS—LIEN OF AGAINST BONA FIDE PURCHASER.**—Under a statute providing that a judgment affecting lands shall not have any preference against a bona fide purchaser for a valuable consideration until the record thereof has been filed and docketed, a deed, given by a judgment debtor for a consideration expressed therein, upon the day that judgment is entered, is valid against it in the absence of proof that it was entered first, or that the purchaser had notice thereof, actual or constructive. (*Sweetland v. Buell*, 676.)

4. **DEEDS—CONDITIONS SUBSEQUENT—WHEN NOT CREATED.**—A prohibitive clause in the habendum of a deed of land to a city, given for a valuable consideration, that "no buildings for any other municipal purpose than that of a city hall shall ever be effected on the granted premises," does not, without any words of re-entry or forfeiture, create a condition subsequent. Hence, the title of the city is not liable to be divested on the happening of the event specified. (*Ecroyd v. Coggeshall*, 741.)

5. **DEEDS — CONDITIONS SUBSEQUENT — DISTINCTION.**—While a conditional estate may be created in a devise or purely voluntary conveyance by any words declarative of the purpose or intention of the donor, such words, declaring that the land is given for a certain purpose or with a particular intention, must, in an ordinary deed for a valuable consideration, be joined with others giving a right to re-enter, or declaring a forfeiture, in a specified contingency, or the grant will not be deemed conditional. (*Ecroyd v. Coggeshall*, 741.)

6. **DEEDS TO CITY—VALID ACCEPTANCE—WHAT IS.**—If land is to be deeded to a city for the purpose of erecting a city hall thereon, and the taxpayers have approved the price to be paid therefor, and selected the site to be purchased, the action of the city council in appointing a committee to take possession of the land, "as soon as a deed thereof approved and accepted by the city solicitor shall have been duly recorded," although informal, amounts to a valid acceptance of the deed, when so approved and recorded, and binds the city. Such action of the council is not a delegation of its power to purchase the land and accept the deed. The duty performed by the city solicitor, in such case, is purely ministerial or administrative. (*Ecroyd v. Coggeshall*, 741.)

7. **DEEDS TO CITY—PAYMENT BEFORE APPROPRIATION—IRREGULARITY NOT AFFECTING TITLE.**—If land is to be deeded to a city for the purpose of erecting a city hall thereon, and the taxpayers have approved the price to be paid therefor, and selected the site to be purchased, and the city council has appointed a committee to take possession of the land, "as soon as a deed thereof approved and accepted by the city solicitor shall have been duly recorded," the action of the city treasurer, after such deed has been recorded, in paying over the price of the land before an appropriation therefor has been made by the city council is irregular, but the payment having been made and the land acquired, such

Irregularity does not affect the city's title. (*Ecroyd v. Coggeshall*, 741.)

See Estate, 2.

DEFINITION.

Affinity. (*State v. Wall*, 195.)

Corporation. (*Monongahela etc. Co. v. Pittsburg etc. Co.*, 635.)

Satisfactory. (*Pennington v. Howland*, 774.)

Sickness. (*Robillard v. Societe etc.*, 806.)

DEVISE.

See Will.

DISTRIBUTION.

See Executor and Administrator, 12.

DOMICILE.

1. INFANTS—DOMICILE.—WHERE PARENTS of minors are domiciled in a certain state, such state becomes at their death the domicile of the minors, until it is shown to have been changed by competent authority. (*Estate of Henning*, 43.)

2. INFANTS ARE INCAPABLE THEMSELVES OF CHANGING their own domicile. (*Estate of Henning*, 43.)

3. INFANTS — DOMICILE AND RESIDENCE — JURISDICTION.—UNDER A STATUTE giving jurisdiction over the persons and estates of minors who are "inhabitants or residents of the county," the word "residence" means domicile or home, as distinguished from a temporary residence, and includes jurisdiction over minors who are temporarily residing in another state. (*Estate of Henning*, 43.)

See Guardian and Ward, 2.

DRAINAGE.

See Constitutional Law, 8.

EIGHT-HOUR ORDINANCE.

See Constitutional Law, 17.

EJECTMENT.

1. EJECTMENT—COTENANCY.—A cotenant is not entitled to recover the whole of the premises in an action of ejectment against a stranger. (*Baber v. Henderson*, 540.)

2. EJECTMENT BY COTENANT.—Each cotenant ousted of possession by a stranger must sue for and recover his aliquot share of the estate which he then holds in common with his disseisor, until the remaining cotenants institute proceedings and oust the stranger from the possession of his or their undivided interest in the premises. (*Baber v. Henderson*, 540.)

3. EJECTMENT BY COTENANT—INTEREST ACQUIRED AFTER SUIT BROUGHT.—A cotenant by action in ejectment against a stranger can recover for only such undivided interest in the premises as he owned at the time of ouster laid. He cannot recover for an interest acquired therein after suit is commenced and

before trial, although such stranger has no interest of any nature in the premises. (*Baber v. Henderson*, 540.)

EMANCIPATION.

See Marriage and Divorce, 4.

EMINENT DOMAIN.

EMINENT DOMAIN—PUBLIC USE.—WHETHER THAT IS A PUBLIC USE for which private property is authorized to be taken depends upon the object aimed at and whether the plan has such an obvious or recognized character of public utility as to justify the exercise of the right of eminent domain or of taxation in its favor. (*Matter of Tuthill*, 574.)

See Constitutional Law, 7, 8.

EQUITY JURISDICTION.

See Will, 13, 14.

ESTATE.

1. ESTATES—EXECUTORY AGREEMENTS—CONTINGENT REMAINDERS.—A deed is inoperative at law as a conveyance if the maker has no estate in the land, but only a naked possibility, such as a contingent remainder, but a conveyance of a naked possibility would be good in equity as an executory agreement, capable of being enforced according to its intent where the maker, by the happening of the contingency, is in a position to give the instrument effect; and a mortgage given by the grantee of such contingent interest, while invalid as a conveyance, is good as an assignment of his right under the deed, viewed as an executory agreement. (*Mudge v. Hammill*, 802.)

2. DEEDS—ESTATES TAIL—RULE IN SHELLEY'S CASE.—To create an estate tail by deed under the rule in Shelley's Case, it is essential that the limitation to the heirs of the body should be to the heirs of the body of the ancestor who takes the particular estate, and to the heirs of the body of that ancestor alone. It is not enough that the limitation should be to the heirs of the person having the particular estate and of another who might have a common heir of their bodies. Hence, where the estate is limited to the wife for life, remainder to the heirs of the bodies of husband and wife, the freehold being in the wife alone, the limitation over is held to be a remainder, and the heirs take as purchasers *per formam doni*, and not by descent. (*Mudge v. Hammill*, 802.)

3. A CONTINGENT REMAINDER DOES NOT RISE TO THE DIGNITY OF AN ESTATE in the land. It is a mere chance of having an estate if the contingency turns out favorably to the remainderman. (*Butterfield v. Sawyer*, 246.)

ESTATE OF DECEDENT.

See Executor and Administrator; Public Land, 3-7.

EVIDENCE.

1. EVIDENCE—CARDS AND CIRCULARS OF THE ACCUSED.—On the trial of an indictment for an unlawful attempt to procure the miscarriage of a woman and thereby causing her death,

cards of the defendant found in his trunk, reading after his name, "Magnetic treatment, female irregularities a specialty. Appointments by mail," and giving his business address, are admissible in evidence as tending to show that he held himself out as a person whose business it was to procure abortions. The prosecuting attorney may properly argue to the jury that such is the meaning of the cards. (*Commonwealth v. Barrows*, 296.)

2. EVIDENCE OF BELIEF OF AN ACCUSED DEFENDANT.—Where the character of an act depends on the intent with which the act is done, or, in other words, upon the operation of the doer's mind, his belief touching certain conditions which should influence him is material, and may be testified to by him. (*Cassidy v. Uhlmann*, 596.)

3. EVIDENCE—BELIEF OF BANK DIRECTOR RESPECTING ITS SOLVENCY.—A director of a bank against whom an action is brought to recover for deposits made, on the ground that they were received when it was, to his knowledge, hopelessly insolvent, should be permitted to testify respecting his belief in regard to its assets at the time the deposits were received. Error in excluding such testimony is not rendered harmless by the presenting of abundant evidence from which the jury could have found that his actual knowledge was such that he could not have entertained any such belief. (*Cassidy v. Uhlmann*, 596.)

4. EVIDENCE—PAYMENT—BURDEN OF PROVING.—If the plaintiff proves the existence of the debt sued upon, the burden of establishing its payment is on the defendant, although, in his complaint, it was necessary for the plaintiff to allege nonpayment. (*Melone v. Ruffino*, 127.)

5. EVIDENCE. PAROL, TO SHOW THE CAPACITY IN WHICH A PARTY ACTED.—Where a written authorization to sell real property is signed by the principal, and his signature is followed by the words, "Administrator of the estate of A B, deceased," it is competent for him to prove by parol that he was acting as such administrator, and that all the parties so understood. (*Melone v. Ruffino*, 127.)

6. ESTATES OF DECEASED PERSONS—PROOF OF HEIRSHIP—DECLARATIONS OF DECEDENT.—At common law before the declarations of a deceased person could be admitted in evidence, in cases of pedigree, the relation of the declarant to the family must be established by other testimony. (*Estate of Williams*, 67.)

7. ESTATES OF DECEASED PERSONS.—IDENTITY OF PERSON IS PRESUMED FROM IDENTITY OF NAME. Hence the identity of a deceased declarant with the brother of the deceased testator named in the will is presumed from the identity of name. (*Estate of Williams*, 67.)

8. EVIDENCE — IDENTITY OF PERSON — BURDEN OF PROOF.—THE PRESUMPTION arising from identity of name is rebuttable, but is sufficient to shift the burden of proof to the other side. (*Estate of Williams*, 67.)

9. ESTATES OF DECEASED PERSONS — DEATH OF LEGATEE — DECLARATIONS OF DECEDENT AS TO FAMILY UNDERSTANDING.—The fact that a residuary legatee died before the testator leaving no issue is sufficiently proved by the declarations of his deceased brother as to the family understanding and belief that such legatee enlisted in the war and was killed, and that he never married. (*Estate of Williams*, 67.)

10. EVIDENCE—WEIGHT AND COMPETENCY—DECLARATIONS OF DECEDENTS.—THE OBJECTION that evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion goes to the weight that should be given such evidence, and not to its competency. (*Estate of Williams*, 67.)

See Railroad, 19, 20; Witness.

EXECUTION.

1. EXECUTIONS—ISSUANCE OF, BY WHAT LAW CONTROLLED.—The issuing of an execution is governed by the law in existence at the time of its issuance. (*Aultman etc. Co. v. Syme*, 565.)

2. EXECUTION ISSUED WITHOUT LEAVE AFTER THE LAPSE OF FIVE YEARS is not void, but only liable to be set aside on motion. (*Aultman etc. Co. v. Syme*, 565.)

3. EXECUTION CREDITORS PURCHASING AT THEIR OWN SALES are not bona fide purchasers, within the meaning of recording acts, so as to be entitled to priority over prior unrecorded deeds. (*Hacker v. White*, 945.)

See Judicial Sale; Time, 2.

EXECUTOR AND ADMINISTRATOR.

1. ADMINISTRATOR—WHEN PERSONALLY LIABLE ON A CONTRACT.—If an authorization to sell real property uses the first person, and the signature of the principal is followed by the words, "Administrator of the estate of A B, deceased," such administrator is personally liable upon a contract made pursuant to such authorization to refund moneys paid to the purchaser to whom no conveyance is made pursuant to the contract or otherwise. (*Melone v. Ruffino*, 127.)

2. ADMINISTRATOR—CONTRACT OF—WHEN NOT UNLAWFUL ON ITS FACE.—A contract by an administrator to sell lands of his intestate, though not authorized by any order of court, is not unlawful in the sense that it deprives the purchaser of the right to recover from the administrator a deposit paid thereon. (*Melone v. Ruffino*, 127.)

3. EXECUTORS AND ADMINISTRATORS—ESTOPPEL AGAINST DEVISEES.—If an executor purchases land for the estate, and is subsequently removed by the devisees, after which a final settlement is made between the executor and devisees, in which the former is not credited with the purchase of the land, but the purchase price thereof is included in other debts due the estate by such executor for which execution is obtained against him and his sureties and satisfied, the devisees are thereby estopped to claim any interest in the land. (*Bishop v. Chase*, 515.)

4. EXECUTORS AND ADMINISTRATORS—SALES BY—PROCEEDINGS TO SUPPORT.—If the proceedings of the probate court fail to show any judgment or order of sale made by that court authorizing a sale of land by the executor of a decedent, and there is no evidence aliunde to show that such order of sale was ever made, the proceedings are insufficient to support such sale. (*Hunter v. Hunter*, 845.)

5. EXECUTORS AND ADMINISTRATORS—VOID SALES—SUBROGATION.—If an executor sells real estate, and uses the proceeds in the payment of the testator's debts under a mistake of

his powers under the will, the purchaser has the right to be subrogated to the claims which he has by his purchase paid, and he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled. (*Hunter v. Hunter*, 845.)

6. ESTATES OF DECEDENTS.—THE HEIRS of a deceased are determined by the laws of the state under which the descent is cast, and comprise those whom the law appoints to succeed to a decedent's estate in case he dies without disposing of it by will. (*Whittenbrock v. Wheadon*, 32.)

7. ESTATES OF DECEDENTS.—One to whom the title or interest of an heir at law is transferred pending administration takes so much only of the share belonging to such heir as remains after the purposes and objects of the administration have been satisfied. (*Curtis v. Schell*, 107.)

8. PRESUMPTION OF KNOWLEDGE OF LAW AND OF COURT PROCEEDINGS—LIMITATION UPON.—Though one is presumed to know the law, he is not presumed to anticipate any unusual or extraordinary proceeding taken under the form or guise of law. Hence, one loaning money to a widow to provide for her support and that of her minor children, and taking a mortgage on her interest in the estate, is not bound to take notice that an application will be made after all the children have reached their majority for a family allowance and for the sale of the property of the deceased to provide means for its payment. (*Curtis v. Schell*, 107.)

9. ESTATES OF DECEDENTS—RELIEF IN EQUITY AGAINST A FAMILY ALLOWANCE.—If a widow, acting as executrix of the estate of her deceased husband, borrows money with which to support herself and her minor children, and secures its payment by a mortgage upon her interest in his estate, and, without disclosing to the court such mortgage, obtains an ex parte order for a family allowance, and subsequently an order authorizing her to sell the real property of the decedent to obtain funds with which to pay such allowance, whereby her title may be divested and such mortgage rendered unavailing, a court of equity has jurisdiction, after the time for appealing from such order has passed, to compel her to apply the proceeds of the sale of such property, as far as may be necessary, to the satisfaction of such mortgage. (*Curtis v. Schell*, 107.)

10. COLLATERAL ATTACK—PROBATE SALE—DEEDS OF ADMINISTRATOR.—A bill which seeks for the removal of administrator's deeds as clouds upon the complainant's title is a collateral attack upon the proceedings of the court under which the sale was had. (*Bradley v. Drone*, 214.)

11. COLLATERAL ATTACK—PROBATE SALE.—MERE IRREGULARITIES in the proceedings of a county court with reference to an administrator's sale are not grounds for a collateral attack. (*Bradley v. Drone*, 214.)

12. ESTATES OF DECEDENTS—DECREES OF DISTRIBUTION—RELIEF FROM.—If a decree of distribution omits one of the heirs at law of the decedent through ignorance or mistake on the part of the executor and the probate judge, and such heir had no notice or knowledge of the probate of the will or the application for distribution, the court may, on his petition, grant him relief by giving him a right to recover of the other heirs the sums received by them in excess of their shares. (*Harris v. Starkey*, 322.)

13. CONSTITUTIONAL LAW—ESTATES OF DECEDENTS—POWER OF THE LEGISLATURE TO AUTHORIZE THE SALE

OF FOR THE BENEFIT, ADVANTAGE, OR BEST INTEREST OF THE ESTATE.—A statute authorizing the court to direct the sale of the real property of a decedent when it appears to be for the advantage, benefit, or best interest of the estate and those interested therein is constitutional, if applied only to the estates of persons dying after its enactment. (Estate of Porter, 78.)

14. CONSTITUTIONAL LAW.—THE RIGHT OF AN HEIR TO INHERIT AN ESTATE, being itself the creature of the statute, is subject to the conditions imposed by statute, such as that the administrator may have a qualified possession and control under the direction of the court for the purpose of paying the debts of the decedent and of selling property, if such sale should be shown to be to the advantage or benefit of the estate or of the persons interested therein. (Estate of Porter, 78.)

See Evidence, 5.

EXPECTANCY.

VESTED RIGHTS—POWER OF LEGISLATURE.—A MERE EXPECTATION of property in the future is not a vested right, and may be changed, modified or abolished by legislative action. (Butterfield v. Sawyer, 246.)

EXPERT TESTIMONY.

See Witness, 1, 2.

EXPLOSIVE.

See Insurance, 8; Negligence, 1.

FAMILY ALLOWANCE.

See Executor and Administrator, 9.

FARMING CONTRACT.

See Cropping Contract.

FELLOW-SERVANT.

See Master and Servant, 7; Railroad, 1, 15.

FINDING.

See Appeal, 9; Limitation of Actions, 3; Trial, 3, 4.

FINE.

See Interest, 2.

FIRE DEPARTMENT.

See Negligence, 9.

FISH AND GAME.

See Game Law.

FIXTURE.

FIXTURES.—GAS AND ELECTRIC LIGHT FIXTURES AND GLOBES, curtains, window and door screens, tables, water-tanks and windmills, when attached to a house, are not fixtures as between the mortgagor and mortgagee. (*Hall v. Law Guarantee etc. Soc.*, 935.)

FORGED CHECK.

See Banks and Banking, 1-3.

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCES.—A FRAUDULENT INTENT in the making of a conveyance is ordinarily a question of fact, but it is not always so. (*Robinson v. McKenna*, 793.)

2. FRAUDULENT CONVEYANCES — FRAUD IN LAW — FRAUD IN FACT.—There is no difference, in principle, between fraud in law and fraud in fact in the law of fraudulent conveyances. If the intent to defraud appears, no matter whether it is from the instrument itself or from extrinsic evidence, it will render the transaction void, fraud in law having the same effect, in this regard, as fraud in fact. The result, in either case, is the same, and it is this to which the law looks. (*Robinson v. McKenna*, 793.)

3. FRAUDULENT CONVEYANCES — SUBSEQUENT JUDGMENT LIEN.—As between the parties thereto, a fraudulent conveyance is absolute and good against the grantor, and no interest, legal or equitable, remains in him, upon which the lien of a judgment subsequently acquired can attach. (*Preston-Parton Mill. Co. v. Horton & Co.*, 928.)

4. FRAUDULENT CONVEYANCES—RIGHTS OF JUDGMENT CREDITORS.—A judgment creditor who has had a conveyance by his judgment debtor set aside in equity as fraudulent against himself, obtaining a decree subjecting the property to sale under his judgment, and bidding it in at such sale, thereby obtains a title superior to that of a prior judgment creditor, who treats the fraudulent conveyance as void, and bids in the property at execution sale under his prior judgment. (*Preston-Parton Mill. Co. v. Horton & Co.*, 928.)

5. FRAUDULENT CONVEYANCES—MORTGAGE BY FRAUDULENT GRANTEE—RIGHT OF CREDITOR TO REDEEM.—If lands fraudulently conveyed are mortgaged by the fraudulent grantee, and then sold under foreclosure, a judgment creditor of the fraudulent grantor who, without having such conveyance annulled, has sold and purchased the property under execution upon his judgment, is not entitled to redeem from such foreclosure, as he is not a successor in interest nor a judgment creditor of the mortgagor. (*Preston-Parton Mill. Co. v. Horton & Co.*, 928.)

6. FRAUDULENT CONVEYANCE—GIFT OF LIFE INSURANCE POLICY—HUSBAND AND WIFE.—A gift by an insolvent husband to his wife of a policy of insurance on his life, exempt from execution, is not a fraud on existing creditors. (*Barron v. Williams*, 840.)

7. FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS OF GRANTEE.—If the good faith of a transfer or conveyance is attacked by creditors, the declarations of the grantor made after the execution of the conveyance, that it was made with intent to defraud creditors, are admissible in evidence. (*Adams v. Dempsey*, 933.)

8. FRAUDULENT CONVEYANCES—AMOUNT OF PROOF REQUIRED.—While proof of fraudulent intent in a conveyance in derogation of the rights of creditors must be clear and convincing, and such as to satisfy the minds of the jury to justify setting it aside, yet, in a given case, if the jury believe from a preponderance of the evidence that the transaction is fraudulent, that is sufficient. (*Adams v. Dempsey*, 933.)

9. FRAUDULENT CONVEYANCES—INTENT QUESTION OF FACT.—A conveyance in derogation of the rights of creditors cannot be declared fraudulent in law, unless it is necessarily so upon its face, otherwise the question of fraud must be left open to investigation as a question of fact, and the good faith of the parties or their intent, or the reasons underlying their conduct must be left for the consideration and determination of the jury. (*Adams v. Dempsey*, 933.)

GAME LAW.

1. GAME LAWS—POSSESSION OUT OF SEASON—INTER-STATE LAWS.—A statute making it unlawful to have in possession certain kinds of fish during certain periods of the year, and imposing a penalty for its violation, applies only to fish taken from the waters of the state, and not to those imported from a foreign country or another state. The mere possession of such fish during the prohibited season is not in itself a violation of the statute, but it is *prima facie* a violation thereof, and casts upon the possessor the burden of proof to show that his possession is lawful. (Per *O'Brien, J., Parker, C. J., Landon, J., and Werner, J.* *Contra, Gray, Haight and Martin, JJ.*) (*People v. Buffalo Fish Co.*, 622.)

2. GAME LAWS—CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—A statute making it unlawful to have in possession certain kinds of fish during certain periods of the year, and imposing a penalty for its violation, in so far as it affects the possession and right of sale by citizens of the state of fish imported from a foreign country or another state, is in conflict with the power of Congress to regulate commerce, and to such extent is unconstitutional and void. (Per *O'Brien, J., Landon, J., and Parker, C. J.* *Contra, Gray, Haight, and Martin, JJ.*) (*People v. Buffalo Fish Co.*, 622.)

GARNISHMENT.

See Attachment, 5-7.

GIFT.

See Fraudulent Conveyance, 6; Husband and Wife, 1.

GUARANTY.

1. GUARANTY—DURATION OF—WHEN RESTRICTED TO THE LIFE OF THE BENEFICIARY.—A guaranty in the name of W. J. R. of a dividend of six per cent per annum on stock subscribed for by him in a specified corporation does not extend beyond his life, where a reasonable time has elapsed subsequently and before his death. (*Rotch v. French*, 292.)

2. GUARANTY—NOTE SECURED BY MORTGAGE—STATUTE OF LIMITATIONS.—A guaranty of the payment of a loan to a corporation secured by a note and mortgage, with interest thereon at the times and according to the terms expressed in such note and mortgage, is an absolute and unconditional one, and a breach thereof occurred when the note mentioned therein fell due

and remained unpaid. Hence an action upon the guaranty is barred by the statute of limitations at the expiration of four years thereafter. (*Pierce v. Merrill*, 56.)

3. GUARANTY—ABSOLUTE AND CONDITIONAL PAYMENT.—An absolute guaranty of payment differs from a conditional guaranty against loss as the result of nonpayment of a debt in this, that in the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, while in the second the contract is in the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor. (*Pierce v. Merrill*, 56.)

4. GUARANTY—REQUEST TO POSTPONE FORECLOSURE SALE.—The request of a guarantor to postpone a foreclosure sale in a suit to foreclose a mortgage given to secure the guaranteed debt, made more than four years after the note and guaranty fell due, does not affect the right of such guarantor to urge that the guaranty was unconditional and was barred by the statute of limitations. (*Pierce v. Merrill*, 56.)

See Agency, 1; Limitation of Actions, 4.

GUARDIAN AND WARD.

1. GUARDIANS—POWER OF COURT TO APPOINT.—Where one of the guardians appointed by a will is dead and the other has resigned, the power of the court to appoint a succeeding guardian is the same as if no appointment at all had been made by the will. (*Estate of Henning*, 43.)

2. INFANTS—DOMICILE—REMOVAL TO ANOTHER STATE—DISCHARGE OF GUARDIAN.—Where minors are permitted to be removed to another state, "to remain until the further order of the court," a subsequent discharge of their guardian without being ordered to return the wards to the state raises no presumption that the court has abandoned its jurisdiction over the persons of the wards and their domicile still remains in the state from which they had been removed. (*Estate of Henning*, 43.)

3. GUARDIANS—RIGHT TO APPEAL—MINORS NOT BROUGHT WITHIN STATE.—A discharged testamentary guardian may be heard on an appeal from an order appointing a succeeding guardian without first bringing the minors within the jurisdiction of the court, where he claims to be the guardian of such minors by appointment of a competent court in another state, where there was no objection made in the lower court to his appearance, and he had never been ordered to bring the minors to California, so that he was not in default in that regard. (*Estate of Henning*, 43.)

4. GUARDIAN AND WARD—LIABILITY OF SURETIES.—If a deposit of money realized on a mortgage given by a guardian to indemnify his sureties is lost without his fault by the insolvency of the depositary, the sureties are still liable to make good the money misappropriated by the guardian in his official capacity, although the deposit of such mortgage money was made to the joint credit of the guardian and his sureties. (*Otto v. Van Riper*, 673.)

5. GUARDIAN AND WARD—ACCOUNTING AS CONDITION PRECEDENT TO SUIT AGAINST SURETIES.—A suit in equity to establish the extent of liability and charge the sureties of a guardian therewith may be maintained, although proceedings for an accounting have not been had against the guardian, if by reason of

his death in another state leaving no estate, such accounting is impossible or impracticable. (*Otto v. Van Riper*, 673.)

HEIR.

See Executor and Administrator, 6, 14; Public Land, 4-7.

HIGHWAY.

A BICYCLE IS NOT A CARRIAGE within the meaning of a statute requiring towns and cities to keep highways in repair, so that the same may be reasonably safe and convenient for travelers with their horses, teams, and carriages. The rider of a bicycle, therefore, cannot recover for injuries received by him and due to a depression in the road. (*Richardson v. Danvers*, 320.)

See Dedication, 1, 2.

HOMESTEAD.

1. HOMESTEAD—PREMISES USED AS A STORE AND HOTEL.—One who owns premises on which he maintains a two-story building for the purpose of conducting therein a general merchandise store and hotel, occupying a portion of the building with his family, is not entitled to dedicate the premises as a homestead, and his conveyance thereof after the attempted dedication, though his wife does not join therein, is valid. (*Beronio v. Ventura etc. Co.*, 118.)

2. HOMESTEAD—SALE OF UNDER A POWER.—Under a constitution or statute exempting homesteads from forced sale, they may be sold by the consent of the owner, and such consent is given by the execution of a valid mortgage thereon with a power of sale, and such consent and power cannot be avoided after the execution of the mortgage. (*Karcher v. Gans*, 893.)

3. HOMESTEAD—FORCED SALES OF—WHAT ARE NOT.—A foreclosure sale, though under a power contained in a mortgage or in pursuance of a decree, is not a forced sale within the meaning of a constitution or statute prohibiting the forced sales of homesteads. (*Karcher v. Gans*, 893.)

4. HOMESTEAD.—ACKNOWLEDGMENT OF A CONVEYANCE OR OF A MORTGAGE UPON A HOMESTEAD BY A WIFE who has signed it is not necessary under a statute which declares that a conveyance or encumbrance of a homestead shall be of no value unless the husband and wife concur in and sign the same instrument. (*Karcher v. Gans*, 893.)

5. HOMESTEAD.—AN ESTOPPEL AGAINST A MARRIED WOMAN'S DENYING that a mortgage of a homestead was properly executed arises when the instrument signed by her has attached thereto a certificate of acknowledgment in due form, and she has for some four years acquiesced in the mortgage, paid interest, and secured an extension of the time for redemption. (*Karcher v. Gans*, 893.)

6. THE DELIVERY OF A MORTGAGE OF A HOMESTEAD BY A WIFE WILL BE PRESUMED as against her when she joined with her husband in signing and acknowledging it, and he subsequently delivered it. Having permitted her husband to take and use such mortgage according to his own judgment, she has no right to complain when he delivered it in accordance with its terms and manifest purposes. (*Karcher v. Gans*, 893.)

See Public Land, 6.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—GIFTS—SEPARATE PROPERTY OF WIFE.—If the property of a wife passes into the possession and control of her husband with her consent, it must be presumed that it is not a gift, but that he takes the property as trustee, for her, although there is no express promise to repay. (*King v. King*, 287.)

2. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—HUSBAND AS TRUSTEE.—If the separate property of a wife passes into the possession and control of her husband, with her consent, she is entitled to recover against his estate only the amount of the principal without interest, in the absence of an agreement to repay or to pay interest, or a demand for repayment. (*King v. King*, 287.)

See Marriage.

ILLEGAL CONTRACT.

See Agency, 4-6; Contract, 8, 9; Sale, 3.

IMPROVEMENTS.

See Betterments.

INDEPENDENT CONTRACTOR.

See Physician, 1.

INDORSEMENT.

See Negotiable Instruments, 2-5.

INFANT.

1. A COURT OF EQUITY WILL PROVIDE FOR THE MAINTENANCE OF INFANTS out of their personal estate and the income of their real estate not only in cases in which the will does not authorize an allowance, but also where it expressly directs an accumulation of the income. It is essential, however, to the granting of the application that the infant should have such an absolute title or interest in the property or its income that the right of no other person will be affected by the allowance. Unless he has such an interest, the consent of any person entitled in remainder, whose estate may be diminished in value by the allowance, must be had before the application will be entertained. (*Pitts v. Rhode Island Hospital etc. Co.*, 821.)

2. EQUITY—ALLOWANCE TO INFANTS—WHEN PROPER.—If the income of the residue of a trust estate is, by the terms of a will, to be applied, in the discretion of the trustee, to the education of the testator's infant child, but no provision is made for its allowance out of such income, a court of equity may, where the other provisions of the will for the support of testator's wife and child are inadequate, order an allowance necessary for the maintenance of the infant out of such income, if the widow, being the only person besides the son whose interest will be affected by the allowance, joins in the bill asking for it. (*Pitts v. Rhode Island Hospital etc. Co.*, 821.)

See Domicile; Marriage and Divorce, 4; Railroad, 21, 22.

INHERITANCE TAX.

See Taxation, 1, 2.

INJUNCTION.

1. INJUNCTION TO RESTRAIN EXPENDITURES OF PUBLIC MONEY BEYOND AMOUNT APPROPRIATED.—When the taxpayers of a city have, by their votes, expressly determined what sum shall be expended for a city hall and its site, the city council cannot expend more than that sum for the purposes specified. Hence, if the sum voted is to be raised by a sale of the city's bonds, and such sale produces more than the amount voted, the appropriation by the city council of the excess toward the purposes specified is illegal and may be enjoined. (*Ecroyd v. Coggeshall*, 741.)

2. INJUNCTIONS AGAINST JUDGMENTS AND OTHER JUDICIAL PROCEEDINGS.—Where by accident, mistake, fraud, or otherwise a party has an unfair advantage in a proceeding in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will restrain him from using the advantage which he has thus improperly gained. (*Curtis v. Schell*, 107.)

3. INJUNCTION—WRONGFUL USE OF CORPORATE NAME—PARTY PLAINTIFF.—A bill for an injunction, against a corporation to restrain it from the wrongful and injurious assumption and use of the name of an individual, or of another corporation, may be maintained by the owner of the name, without intervention of the state, as such a suit is not one to annul the corporation. (*Armington v. Palmer*, 786.)

4. INJUNCTION—USE OF CORPORATE NAME—PROOF OF DAMAGES—DEFENSE.—When a bill is brought to enjoin a corporation from the wrongful assumption of a corporate name to the injury of an individual or of another company, it is not necessary to show actual damages, and the absence of fraudulent intent is no defense. (*Armington v. Palmer*, 786.)

5. INJUNCTION AGAINST REDEMPTION PROCEEDINGS.—A party interested is entitled to an injunction against proceedings to redeem property from a foreclosure sale when it appears that if such proceedings are allowed to continue he will be compelled to part with an incident to his title to one who has shown no right to obtain it. (*Preston-Parton Mill. Co. v. Horton & Co.*, 928.)

See Corporation, 13; Waters, 8-12.

INSOLVENCY.

See Bankruptcy.

INSTALLMENT.

See Sale, 4.

INSTRUCTION.

1. TRIAL—INSTRUCTIONS.—The jury need not be again instructed as to the effect of evidence, if such instruction is given at the time when the evidence is received. (*Mason v. Southern Ry. Co.*, 826.)

2. INSTRUCTIONS.—THE EXPRESSION "GROSS NEGLIGENCE," in a charge to a jury, does not of itself define, nor does it include, that extreme degree of negligence which is wanton, or reckless of injurious consequences. Its use, therefore, is not erroneous, where the jury are instructed not to give exemplary damages, and other instructions given direct an apportionment of damages in case of contributory negligence. (Florida etc. R. R. Co. v. Foxworth, 149.)

3. INSTRUCTIONS — ASSUMING DISPUTED FACTS AS PROVED.—It is error to give an instruction which assumes any disputed fact as proved. An instruction which merely asserts an abstract legal proposition, without attempting to apply it to the facts of the particular case on trial, but leaving it to the jury to make the application to the facts as found by them, does not assume as proved any matter of fact in dispute. (Florida etc. R. R. Co. v. Foxworth, 149.)

INSURANCE.

1. INSURANCE ON MORTGAGED BUILDINGS—INTEREST OF MORTGAGEE—EXTINGUISHMENT OF DEBT.—Where a mortgagor insures the mortgaged buildings as further security for the indebtedness, a stipulation in the policy for payment to the mortgagee in case of loss does not substitute the mortgagee for the mortgagor as the party insured; the mortgagee has an interest in the policy only as security for his debt, and such interest ceases whenever the debt is discharged. (Reynolds v. London etc. Ins. Co., 17.)

2. INSURANCE—MORTGAGED PROPERTY PURCHASED UNDER FORECLOSURE—EXTINGUISHMENT OF DEBT.—The purchase of mortgaged premises by a mortgagee under foreclosure proceedings for the full amount of the judgment extinguishes the debt, and such purchaser is no longer a creditor or mortgagee. Hence he has no further interest in an insurance policy taken by the mortgagor, in which his interest was only as security for his debt. (Reynolds v. London etc. Ins. Co., 17.)

3. INSURANCE—LOSS AFTER FORECLOSURE AND BEFORE REDEMPTION—PAYMENT TO MORTGAGEE.—The fact that an insurance loss has been paid to a mortgagor during the period of redemption does not render the insurance company liable to the mortgagee, where his interest in the policy has ceased with the extinguishment of the mortgage indebtedness. (Reynolds v. London etc. Ins. Co., 17.)

4. INSURANCE.—THE BURDEN OF PROVING THE BREACH OF A CONDITION of a policy of insurance which has once attached is on the insurer. (Clinton v. Norfolk Mut. Fire Ins. Co., 325.)

5. INSURANCE—INCREASE OF RISK.—There is no presumption that a transfer by the insured of all his interest in the property except a life estate, increases the risk. (Clinton v. Norfolk Mut. Fire Ins. Co., 325.)

6. INSURANCE—TRANSFER OF INTEREST WHICH WILL NOT DEFEAT.—A transfer by the insured of less than his entire interest in the property does not defeat the policy. (Clinton v. Norfolk Mut. Fire Ins. Co., 325.)

7. INSURANCE—CONDITION AGAINST SALE.—A condition in a policy of insurance against loss by fire that the policy shall be void if, without the consent of the insurer, the property shall be sold, does not apply to a transfer by which the insured reserved

a life estate to himself. This condition refers only to an absolute transfer of the entire interest of the insured completely divesting him of all his insurable interest. (*Clinton v. Norfolk Mut. Fire Ins. Co.*, 325.)

8. **INSURANCE—ALIENATION OF ONE OF TWO PARCELS OF INSURED PROPERTY.**—If a policy insuring a house and barn against loss by fire provides that it shall be void if the property is sold without the consent of the insurer, a sale of the barn does not affect the right to recover for the loss of the house. The condition applies only upon the sale of the entire property, though, after the sale of the barn, its former owner cannot recover for its subsequent destruction because of his want of insurable interest at that time. (*Clinton v. Norfolk Mut. Fire Ins. Co.*, 325.)

9. **INSURANCE—KEEPING DYNAMITE ON PREMISES.**—If a policy of insurance provides that it shall be void if dynamite is kept, used, or allowed on the premises, unless otherwise provided by agreement indorsed on the policy or added thereto, and a slip is attached to the policy providing that the insurance shall cover certain articles and such other merchandise as is usually kept for sale in a retail hardware store, the policy is not avoided by reason of keeping dynamite on the premises, if it can be proved to be an article of merchandise usually kept for sale in a retail hardware store. (*Phenix Ins. Co. v. Walters*, 257.)

10. **ASSIGNMENTS.—POLICIES OF LIFE INSURANCE** may be assigned by parol. (*Barron v. Williams*, 840.)

11. **INSURANCE BENEFIT ASSOCIATIONS—FORFEITURE—WAIVER.**—Forfeiture of insurance in a mutual benefit association on account of nonpayment of dues may be waived by demanding and receiving such dues after the death of the insured with knowledge of his death. (*Supreme Tribe of Ben Hur v. Hall*, 262.)

12. **INSURANCE—FORFEITURE—PLEADING.**—A reply to an answer setting up a forfeiture of insurance in a mutual benefit association for nonpayment of dues, alleging that the association, by its local officer, demanded and received such dues after the death of the member, is not a departure from the cause of action stated in the complaint alleging the authority of such local officer to collect such dues. (*Supreme Tribe of Ben Hur v. Hall*, 262.)

13. **INSURANCE—BENEFIT ASSOCIATIONS—AGENTS.**—A local officer of a benefit association, required by its by-laws to collect dues from members, is the agent of the association, and a member discharges his obligation to the association when he pays his dues to such agent. He has a right to rely upon their proper application. (*Supreme Tribe of Ben Hur v. Hall*, 262.)

14. **INSURANCE—BENEFIT ASSOCIATIONS—PAYMENT OF DUES—EVIDENCE.**—In an action on a policy of insurance in a mutual benefit association, evidence that the insured had access to a safe with permission to use the money therein is admissible on the issue of the nonpayment of his dues. (*Supreme Tribe of Ben Hur v. Hall*, 262.)

15. **INSURANCE—BENEFICIAL ASSOCIATIONS—CHANGE OF BY-LAWS MUST BE REASONABLE.**—The rights of members in benefit insurance associations depend upon the articles of association and the by-laws which have been adopted; and, generally speaking, the body authorized to make by-laws may change, amend, or repeal those already in existence, subject, however, to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and also subject to the implied con-

dition that such change, amendment, or repeal must be reasonable. (*Thibert v. Supreme Lodge, etc.*, 412.)

16. **INSURANCE — BENEFICIAL ASSOCIATIONS — CHANGE OF BY-LAWS WITHOUT NOTICE—EFFECT OF.**—A person who becomes a member of a benefit insurance association may consent to whatever by-laws he may see fit, but a change of by-laws, without his personal knowledge, after he becomes a member may be unreasonable as to him, and of no effect. (*Thibert v. Supreme Lodge, etc.*, 412.)

17. **INSURANCE — BENEFICIAL ASSOCIATIONS — CHANGE OF BY-LAWS—WHEN UNREASONABLE AND INEFFECTIVE.** If a member of a benefit insurance association is entitled, under existing by-laws, to a certain kind of notice of assessments, when he joins the association, as a prerequisite to suspension and consequent loss of rights in the benefit fund, a subsequent change of such by-laws, respecting the method of giving notice, and expressly providing that no failure on the part of the lodge to give notice, or failure to receive it, should relieve members from the penalty of absolute and unqualified suspension, if assessments were not paid, thus virtually depriving the member of all right to any notice, either directly or indirectly, and rendering the giving of notice wholly immaterial, is, as to such member, unreasonable and of no effect, where he is not shown, up to the time of his death, to have had any knowledge of the change, although a newspaper notice of assessments was mailed to him. (*Thibert v. Supreme Lodge, etc.*, 412.)

18. **INSURANCE — BENEFICIAL ASSOCIATIONS — ACTUAL NOTICE OF ASSESSMENTS—DEFAULT.**—If a member of a beneficial insurance association had actual notice of assessments, and promised to pay, but a reasonable time, such as about one month, expired thereafter, before his death, in which to pay, but payment was not made, there can be no recovery on his certificate. (*Thibert v. Supreme Lodge, etc.*, 412.)

See *Fraudulent Conveyance*, 6.

INTEREST.

1. **INTEREST—CONTRACT TO PAY.—INVOICES** which are sent with each shipment of goods and received by the buyer without objection, and which contain the words "bills bear interest after maturity. Terms sixty days," constitute a contract to pay interest. (*Braun v. Hess*, 221.)

2. **JUDGMENT FOR FINE—INTEREST UPON—WHEN NOT ALLOWABLE.**—A general statutory provision to the effect that interest is payable on all judgments recovered within the state is not applicable to judgments penal in their nature, as where a corporation is adjudged guilty of having usurped a franchise, and fined therefor in a sum designated. (*People v. Sutter St. Ry. Co.*, 137.)

INTERVENTION.

1. **INTERVENTION — FORECLOSING MORTGAGE — DEFAULT—DISMISSAL.**—In an action to foreclose a mortgage, the heir of a deceased mortgagor may be refused leave to intervene after the default of the administratrix, and the dismissal of his complaint in intervention filed after such default is not an abuse of discretion. (*Hibernia Sav. etc. Soc. v. Churchill*, 73.)

2. **INTERVENTION.—AS A GENERAL RULE**, an intervention will not be allowed when it would retard the principal suit, or re-

quire a reopening of the case for further evidence, or delay the trial of the action, or change the position of the original parties. (*Hibernia Sav. etc. Soc. v. Churchill*, 73.)

3. **INTERVENTION BEFORE TRIAL—DEFAULT.**—Since an intervention must be made before the trial, a complaint in intervention is properly dismissed where it is filed after default has been made, because a default by which all of the issues tendered by the complaint are admitted in favor of the plaintiff is the equivalent of a trial when the case is litigated. (*Hibernia Sav. etc. Soc. v. Churchill*, 73.)

INVOICE.

See Interest.

ISLAND.

See Waters, 2.

JUDGE.

1. **JUDGES — DISQUALIFICATION — AFFINITY — HUSBAND OR WIFE OF BLOOD RELATIVE.**—When a judge is disqualified to sit in a case because a blood relative of his wife is a party, he should likewise be excluded when the husband or wife of such relative is a party, for they should be regarded as one person, so far as the matter in litigation is involved. (*State v. Wall*, 195.)

2. **JUDGES — DISQUALIFICATION—AFFINITY—HUSBANDS OF AUNT AND NIECE.**—Under a statute disqualifying a judge when he would be excluded from being a juror by reason of his affinity to either of the parties, the husbands of an aunt and niece of the full blood are so related to each other as to disqualify the one from sitting as judge in a case in which the other is an interested party. (*State v. Wall*, 195.)

3. **A JUDGE IS NOT DISQUALIFIED ON THE GROUND OF INTEREST** unless he is pecuniarily and directly or immediately interested in the very issue in question. His interest must not be remote, uncertain, or speculative. (*State v. Call*, 189.)

4. **A JUDGE IS DISQUALIFIED ON THE GROUND OF INTEREST**, in a suit to enjoin county commissioners from levying a specific tax, of a certain amount, on the taxpayers of a school district, within the limits of a city, though such district is of itself a corporation, where the judge is the owner of property therein subject to taxation. (*State v. Call*, 189.)

5. **JUDGES — DISQUALIFICATION.**—A STATUTE declaring what are not disqualifications of a judge should not be so construed as to embrace cases not clearly within its letter and spirit, particularly if its purpose is to make a judge sit in the trial of a case in which he is directly interested, though as a taxpayer in common with others. (*State v. Call*, 189.)

6. **JUDGES.—A STATUTE DECLARING THAT NO JUDGE SHALL BE DISQUALIFIED** where a county or municipal corporation is a party, on the ground of his being a resident and taxpayer therein, does not remove his disqualification from sitting in a case where it is sought to enjoin county commissioners from levying a special tax of a certain amount on the taxable property of a quasi corporation, such as a school subdistrict, situated within the limits of a city, and where the judge has property in such district subject to taxation, as neither the city nor the county is a party to the suit, or a party in interest, and the district cannot be classed

as a municipal corporation, such as was intended by the statute. (State v. Call, 189.)

JUDGMENT.

1. A JUDGMENT LIEN CANNOT BE PROLONGED BY A COURT OF EQUITY beyond the period fixed by the statute, though the suit is commenced and at issue within such period, but is not reached for trial until after the expiration thereof. Courts must apply statutes enacted without excepting anyone from the operation thereof, regardless of what they may think the legislature would have done if certain conditions had been considered; and when such statutes begin to run, judicial power cannot arrest their action. (Ruth v. Wells, 902.)

2. JUDGMENTS—PRESUMPTION OF RENDITION.—If the record shows no final judgment, and only that certain steps leading up to a judgment have been taken, the fact that such judgment has been rendered cannot be presumed. (Hunter v. Hunter, 845.)

3. JUDGMENTS—NUNC PRO TUNC.—THE POWER IS INHERENT in courts of law and equity to make entries of judgments or decrees nunc pro tunc in proper cases and in furtherance of the interests of justice. (Knefel v. People, 217.)

4. JUDGMENTS—AMENDING—NUNC PRO TUNC—SUBSEQUENT TERM.—A court may, upon notice to parties in interest, by an order entered nunc pro tunc, amend or correct a judgment after the term at which it was rendered, when, by reason of a clerical misprision, it does not speak the truth. (Knefel v. People, 217.)

5. JUDGMENTS—AMENDING—CRIMINAL RECORD.—A clerical error in the record of a criminal case, showing that the motion for a new trial was overruled when in fact it was allowed, may be corrected at a term subsequent to the term when the same is made, where the accused after a nolle prosequi seeks to use the record in his favor upon a second indictment for the same offense. (Knefel v. People, 217.)

6. JUDGMENTS—AMENDING—USE OF CLERK'S MINUTES.—Where a court has power to correct the record of a criminal case it is competent for it to examine the minute-book, journal, and docket of the clerk of the criminal court, and hear the evidence of witnesses explanatory of the method in which the same were kept and the record written up therefrom. (Knefel v. People, 217.)

7. RES JUDICATA.—Where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or judgment is rendered, and does not extend to matters which might have been, but were not, litigated and determined in the former action. (Pitts v. Oliver, 907.)

8. RES JUDICATA—EFFECT UPON PLAINTIFF OF ISSUES LITIGATED BETWEEN DEFENDANTS.—If in an action to foreclose a mortgage upon chattels, two of the defendants present and have litigated the question of whether one of them is liable to the other for negligence in the care of such chattels, the finding and judgment do not conclude the plaintiff, and a recovery by one of the defendants from the other for such damages does not prevent the plaintiff from maintaining a subsequent action against the same defendant for damages suffered by the plaintiff from such defendant's negligence in the care of the same property. (Pitts v. Oliver, 907.)

9. RES JUDICATA.—PLAINTIFF IS NOT CONCLUDED BY THE RESULT OF A LITIGATION BETWEEN TWO DEFENDANTS in an action concerning a matter upon which the plaintiff's complaint tendered no issue. (*Pitts v. Oliver*, 907.)

10. JUDGMENTS—RES JUDICATA—RELIEF IN EQUITY.—If there is a full, complete, and adequate remedy at law against a judgment, by motion to vacate and set it aside, and to appeal from the order made upon such motion, a person who has moved to vacate a judgment, and has failed to take an appeal from the denial of his motion, is estopped to maintain an action in equity to cancel such judgment. The decision upon the application to vacate the judgment at law is *res judicata*, and a bar to any subsequent proceeding in equity. (*Chezum v. Claypool*, 955.)

11. JUDGMENTS—RES JUDICATA.—If a material fact, decisive of the case, is tendered as an issue and not withdrawn, a determination thereon adversely to the party tendering it is conclusive against him in a subsequent suit involving the same issue, whether he introduced evidence in the former action in support of such issue or not. (*O'Brien v. Manwaring*, 426.)

12. JUDGMENTS ARE NOT NECESSARILY CONCLUSIVE OF every matter which the parties might have litigated in the action, as where matters occurring subsequent to its judgment might have been, but were not, pleaded or otherwise called to the attention of the court. (*Maddux v. County Bank*, 143.)

13. JUDGMENT—ESTOPPEL AGAINST ASSERTING MATTERS OCCURRING PENDENTE LITE.—A judgment by default in a suit to foreclose a mortgage does not estop the defendant from maintaining a subsequent action to recover payments made during the pendency of the former suit, but not credited to nor pleaded by him, nor otherwise called to the attention of the court. (*Maddux v. County Bank*, 143.)

14. COLLATERAL ATTACK — JURISDICTION — PRESUMPTION FROM RECITALS IN DECREE.—Where a decree recites that the defendants were duly served with process or by publication as the law requires, and the court finds that it had jurisdiction of the parties and the subject matter, it will be presumed in a collateral attack, even if the summons in the record was void, that another and proper summons was issued and served, and that proper publication notice was had and a correct certificate of mailing of notice and of publication was before the court. (*Bradley v. Drone*, 214.)

15. JUDGMENT—COLLATERAL ATTACK FOR WANT OF JURISDICTION—PRESUMPTION.—When a domestic judgment is collaterally attacked for want of jurisdiction, the jurisdiction is to be conclusively presumed, unless the contrary affirmatively appears on the face of the record itself; and this presumption obtains when the record is silent upon the jurisdictional fact as well as where it affirmatively states or recites it. (*Gulickson v. Bodkin*, 352.)

16. JUDGMENT—COLLATERAL ATTACK—WANT OF JURISDICTION DOES NOT AFFIRMATIVELY APPEAR, WHEN.—The mere absence from the judgment-roll of certain papers which ought to have been made a part of it, and which, if included, would affirmatively show that jurisdiction had been acquired, is not enough to make it "affirmatively appear from the face of the record that the court had no jurisdiction." (*Gulickson v. Bodkin*, 352.)

17. PRACTICE—WAIVER OF NOTICE OF MOTION.—The appearance of a defendant at the hearing of a motion to set aside

a judgment of dismissal, and resting it on its merits, without any objection that no previous notice had been given, constitutes a waiver of the usual notice of motion. (*Toy v. Haskell*, 70.)

18. PRACTICE—AFFIDAVIT OF MERITS—SETTING ASIDE JUDGMENT OF DISMISSAL.—A motion to set aside a judgment of dismissal, which was based upon a stipulation signed by one of the parties without the knowledge or consent of his attorneys, is a motion to set aside a judgment entered without authority of law, and requires no affidavit of merits. (*Toy v. Haskell*, 70.)

See Deed, 3; Fraudulent Conveyance, 3, 4; Injunction, 2; Interest, 2.

JUDICIAL SALE.

1. JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID. If land is sold at judicial sale by metes and bounds, and it subsequently appears that a portion of the land within such boundary is held by title paramount, a survey to ascertain that the bidder has not received the number of acres sold is not necessary to entitle him to an abatement of his bid. (*People's Bank v. Bramlett*, 855.)

2. JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID. A purchaser of land at judicial sale by metes and bounds is entitled to an abatement of his bid to cover a deficiency of land within such boundary held by title paramount. (*People's Bank v. Bramlett*, 855.)

3. JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID—ESTOPPEL.—A purchaser of land at judicial sale by metes and bounds is not estopped, by constructive notice of a judgment affecting the property sold, from seeking before compliance with his bid an abatement thereof for a deficiency in acreage, discovered after the sale and held by title paramount. (*People's Bank v. Bramlett*, 855.)

4. JUDICIAL SALES.—RULE OF CAVEAT EMPTOR does not apply to executory sales of real estate by a court of equity. (*People's Bank v. Bramlett*, 855.)

5. JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID. A purchaser of land sold by metes and bounds at judicial sale, before completing his contract, may seek an abatement of his bid for a deficiency in acreage, if he has done nothing creating an estoppel. (*People's Bank v. Bramlett*, 855.)

6. JUDICIAL SALES—DEFICIENCY—ABATEMENT OF BID—EXECUTED CONTRACT.—Misrepresentation and deficiency of acreage are sufficient grounds for the abatement of a bid at a judicial sale of land sold by metes and bounds, even after the contract is executed, if no element of waiver or estoppel intervenes to prevent. (*People's Bank v. Bramlett*, 855.)

JURISDICTION.

COUNTY COURTS — JURISDICTION — PRESUMPTION.—County courts in Illinois are courts of general jurisdiction, in favor of whose jurisdiction every presumption will be indulged. (*Bradley v. Drone*, 214.)

JUROR.

See Trial, 1.

KICKING CAR.

See Railroad, 10.

LABOR UNION.

1. **LABOR UNIONS—UNLAWFUL ATTEMPT OF ONE TO COERCE AND CONTROL ANOTHER.**—A general scheme on the part of a labor union and its members to compel the members of another union to desert it and become members of the former, and, if necessary to that end, to threaten employ  s and cause them to believe there would be trouble and strikes or boycotts if they continue their employment unless the members abandon their labor union and join the other, is unlawful, and the further prosecution of the scheme may be enjoined at the instance of the members of the union against which the scheme is aimed. It is not material that no violence has been resorted to, and that the persons, in pursuing their unlawful scheme, have been courteous in their manners. (Plant v. Woods, 330.)

2. **LABOR UNIONS—UNLAWFUL INTERFERENCE WITH LABOR—WHAT IS.**—Every person has a right, under the law, as between him and his fellow-citizens, to full freedom in disposing of his own labor or his own capital according to his will. Every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description done, not in the exercise of the actor's own right, but for the purpose of obstruction, is, if damage be caused thereby to the party obstructed, a violation of this prohibition. (Plant v. Woods, 330.)

LANDLORD AND TENANT.

LANDLORD AND TENANT—TRESPASS BY LANDLORD.—A landlord who, after the expiration of a lease, forcibly enters the premises and puts out the goods of his tenant, does not thereby become liable as a trespasser ab initio, nor do the rules governing bailor and bailee have any application in such case. (Rush v. Aiken Mfg. Co., 836.)

See Statute of Frauds, 2, 3.

LARCENY.

1. **LARCENY—TAKING PROPERTY UNDER CLAIM OF TITLE.**—In all cases where one in good faith takes another's property under claim of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim may be in fact. And the same is true where the taking is on behalf of another, believed to be the true owner. Still, if the claim is dishonest, a mere pretense, it will not protect the taker. (Dean v. State, 186.)

2. **LARCENY—PRESUMPTION OF NO FELONIOUS INTENT—NECESSITY OF REPELLING.**—If property is taken openly, and there is no subsequent attempt to conceal it, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction for larceny is authorized. (Dean v. State, 186.)

LEASE.

See Statute of Frauds, 2, 3.

LIBEL.

1. **LIBEL.—A COMMUNICATION, TO BE PRIVILEGED,** must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery, and, in the absence of such proof, the plaintiff cannot recover. (*Hebner v. Great Northern Ry. Co.*, 387.)

2. **LIBEL—PRIVILEGED COMMUNICATION—RECORD OF RAILWAY EMPLOYÉ—PUBLICATION.**—If a railway company keeps a record of each of its employés for the information of those whose business it is to employ men for the company's service, and showing the reasons why men have been discharged, but issues "service cards" to those who have left its employment, for the purpose of assisting men to obtain work when going from one company to another, a telegraph operator and station agent, who has been dismissed from the service of the company, according to its record, for being "insolent and abusive to company's patrons," and who has applied to the company's superintendent of telegraphs for a service card, cannot maintain an action for libel against the company for the publication of the words quoted, where, upon such application, the record-book was produced and the entry read, in the company's office, by one of the clerks to another, in the presence of the superintendent and the plaintiff, for the purpose of filling out the card; where both clerks were interested and acting strictly within the line of their duty; where the card was then filled out with the derogatory words, signed by the superintendent, and handed to the applicant; and where this was the only publication complained of. Such a communication was of a privileged character, made on a privileged occasion, and cast upon the plaintiff the necessity of showing malice in fact. (*Hebner v. Great Northern Ry. Co.*, 387.)

LICENSE.

See Constitutional Law, 11.

LIMITATION OF ACTION.

1. **STATUTE OF LIMITATIONS—ACCOUNT STATED.**—If a balance due upon an account stated is afterward thrown into a new account stated, the first account is taken out of the statute of limitations. (*Ready v. McDonald*, 76.)

2. **STATUTE OF LIMITATIONS—ACCOUNT STATED—PLEADING.**—If a complaint alleges an account stated which on its face is barred by the statute of limitations, but a subsequent allegation shows that this account was carried into and became an item in a second account stated which is not barred by the statute of limitations, and the prayer of the complaint is for the amount of the second account stated, the cause of action is based upon the second account and a demurrer is properly overruled. (*Ready v. McDonald*, 76.)

3. **STATUTE OF LIMITATIONS.—FINDINGS** are sufficient if the truth or falsity of each material allegation in issue can be demonstrated therefrom. Hence a finding that a second account stated included the amount due in a first account stated is a finding that the action is not barred by the statute of limitations. (*Ready v. McDonald*, 76.)

4. STATUTE OF LIMITATIONS — GUARANTY — REMOVAL OF BAR.—In an action on an absolute and unconditional guaranty, where the complaint shows on its face that the action is barred by the statute of limitations, a written admission of one of the guarantors of the existing indebtedness of the corporation, for which the guaranty was given, but which does not refer in any manner to the contract of guaranty, does not remove the bar of the statute. (*Pierce v. Merrill*, 63.)

5. STATUTE OF LIMITATIONS — REMOVAL OF BAR — WRITING.—A promise or acknowledgment relied upon to take a contract out of the statute of limitations must be in writing, and must be a direct, distinct, unqualified, and unconditional admission of the debt, which the party is liable and willing to pay. (*Pierce v. Merrill*, 63.)

6. PLEADING—STATUTE OF LIMITATIONS—AVOIDANCE OF.—A plaintiff who relies upon a written acknowledgment of indebtedness, or upon any other fact, to take the case out of the statute of limitations, must plead it in his complaint. (*Pierce v. Merrill*, 63.)

7. LIMITATIONS OF ACTIONS—PLEADING.—The statute of limitations, to be available as a defense, must be pleaded, and if not pleaded is waived, except when the question is raised by demurrer, although the bar of the statute appears on the face of the complaint. (*Gilbert v. Hewetson*, 486.)

See Adverse Possession.

LIS PENDENS.

LIS PENDENS.—The filing of a notice of action to enforce a judgment lien cannot, where the lien has expired before the action is tried, have any effect in extending the lien, nor entitle the judgment creditor to enforce it in any manner. (*Ruth v. Wells*, 902.)

MAINTENANCE.

See Infant, 1, 2.

MARRIAGE AND DIVORCE.

1. MARRIAGE—PROOF OF, FROM COHABITATION AND REPUTE.—To prove a marriage by cohabitation and reputation, the origin of the cohabitation must have been consistent with a matrimonial intent; the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed; and the reputation of marriage must have been general and uniform. (*Williams v. Herrick*, 809.)

2. MARRIAGE UNDER AGE OF COMPETENCY—VALIDITY OF.—The marriage of a person who has not reached the age of competency, as established by the statute, but who is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterward, if the parties have not voluntarily cohabited as husband and wife, after reaching the age of consent. (*State v. Lowell*, 358.)

3. MARRIAGE—EFFECT OF, WHEN VOIDABLE.—A voidable marriage must be treated as valid, for all civil purposes, until it is annulled by a judicial decree. (*State v. Lowell*, 358.)

4. **MARRIAGE OF MINOR—EMANCIPATION.**—The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent. Hence, the father of a married girl, nearly fourteen years of age, has no right to detain her, if she elects to live with her husband. (*State v. Lowell*, 358.)

5. **MARRIAGE AND DIVORCE—PROHIBITION ON REMARRIAGE—MARRIAGE IN ANOTHER STATE.**—A statute merely prohibiting the remarriage of either party within a certain time after a decree of divorce is rendered has no extraterritorial effect. If one of the parties marries in another state within the prohibited period, and such marriage is valid under the laws of that state, it must be held valid in the state where the divorce was granted. (*Willey v. Willey*, 923.)

See Husband and Wife.

MASTER AND SERVANT.

1. **MASTER AND SERVANT—MEASURE OF LIABILITY.**—Employers are not insurers of their employés, as absolute safety is unattainable. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in method, machinery, and appliances is the ordinary usage of the business, and no man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. (*Service v. Shoneman*, 689.)

2. **MASTER AND SERVANT—MASTER'S LIABILITY.**—In an action to recover for injury to an employé caused by a sudden and unusual escape of steam from the end of a boiler, there can be no recovery if the evidence shows that the employer purchased such boiler after extensive inquiry among business men, that he paid a high price for it, that it was recommended as nonexplosive, that similar boilers were in general use, that it was operated by a competent engineer, and that just prior to the accident it was officially inspected and certified to be perfectly safe and in good condition. (*Service v. Shoneman*, 689.)

3. **MASTER AND SERVANT—DEFECTS, DUTY OF INQUIRY RESPECTING.**—An employé is not required to exercise any degree of care or diligence to discover defects. He will not be held to have assumed the risk of them unless he was actually informed of such defects, or they were so obvious that he must have known or simply refused to open his eyes and see; or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect. (*Starr v. Kreuzberger*, 92.)

4. **MASTER AND SERVANT—OPPORTUNITY OF SERVANT TO DISCOVER RISKS OR DEFECTS.**—The fact that a servant has as good an opportunity as his master to know of defects involving risks does not necessarily charge him with contributory negligence, so as to preclude his recovery for injuries suffered through such defects. He has the right to rely on his master's inquiry, because it is the latter's duty to inquire, and the servant may assume that proper inquiry has been made by the master. (*Starr v. Kreuzberger*, 92.)

5. **MASTER AND SERVANT.**—The fact that an employé had two years before helped to construct a wall cannot be accepted as conclusively charging him with notice of its position and condition. He is not chargeable with contributory negligence because he acted upon his employer's assurance respecting the safety of proceeding with his work upon or about such wall. (*Starr v. Kreuzberger*, 92.)

6. MASTER AND SERVANT—NEGLIGENT USE OF MATERIALS SUPPLIED.—Where, as in placing derricks for a temporary use, an employer exercises reasonable care to furnish safe and proper materials and to employ competent and skillful workmen, he has discharged his whole duty, and is not responsible to an employé for the negligent use of the materials so furnished. (*Dougherty v. Milliken*, 608.)

7. MASTER AND SERVANT—FELLOW-SERVANT OR VICE-PRINCIPAL.—A foreman of a stone quarry, whose duty it is to warn servants working in one tunnel to leave their work before a blast in an adjoining tunnel is fired, is a fellow-servant and not a vice-principal of one who is injured by reason of his failure to give such warning, since both are employed by the same employer in the same general business. (*Donovan v. Ferris*, 25.)

8. MASTER AND SERVANT—LIABILITY OF MASTER FOR FOREMAN'S NEGLIGENCE.—A master is not liable for an injury to a servant due to the negligence of his foreman, where both servants are employed in the same general business, unless he has failed to use ordinary care in the selection of such foreman. (*Donovan v. Ferris*, 25.)

9. MASTER AND SERVANT—BLASTING—DUTY TO GIVE WARNING.—It is not a duty personal to a master to give warning of danger to those employed in the business of blasting, and his liability ceases when he has employed a competent person to give such warning. (*Donovan v. Ferris*, 25.)

10. MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE TO WORK AND SUITABLE MACHINERY.—It is the duty of an employer to furnish his employé suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provision for the safety of the employés as will reasonably protect them from the dangers incident to their employment. (*Donovan v. Ferris*, 25.)

11. MASTER AND SERVANT—EVIDENCE—CROSS-EXAMINATION.—Where a foreman upon his direct examination testifies that he was employed by and was under the direction of a superintendent, it is not error as calling for the conclusion of the witness to ask him on cross-examination whether the superintendent had authority to direct him, since if he was employed by the superintendent it followed, as a matter of law, that the superintendent had authority to direct him. (*Donovan v. Ferris*, 25.)

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—ATTORNEY'S FEE—ALLOWANCE OF.—An attorney's fee allowed by statute for the successful establishment and enforcement of a mechanic's lien is incidental to the lien claim, and is entitled to payment on the same basis as the judgment for labor or material furnished. (*Dell v. Marvin*, 171.)

2. CONSTITUTIONAL LAW—ATTORNEY'S FEE—ALLOWANCE OF.—A STATUTE which allows an attorney's fee to the plaintiff, in enforcing a mechanic's lien, when he recovers judgment, does not contravene any provision of the state or federal constitution. (*Dell v. Marvin*, 171.)

MINES AND MINING.

See Trespass.

MONOPOLY.

1. **CONTRACTS TENDING TO CREATE MONOPOLIES.**—Contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent a competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and void. (*Cummings v. Union Blue Stone Co.*, 655.)

2. **CONTRACTS TENDING TO CREATE MONOPOLIES.**—An agreement between the producers of nearly the whole product of a commercial commodity, and a company engaging to sell all of such marketable commodity produced by them for a term of years at prices fixed by them, to apportion the sales between such producers and no sales to be made except through such company, tends to create a monopoly, and is void as against public policy. (*Cummings v. Union Blue Stone Co.*, 655.)

MORTGAGE.

1. **MORTGAGE—EFFECT OF CONVEYANCE ASSUMING PAYMENT.**—If a deed specifies that it is subject to a mortgage (designating it), and that the grantee assumes its payment, this amounts to a covenant that he will pay the note for the security of which the mortgage was given. (*Daniels v. Johnson*, 123.)

2. **MORTGAGE—STATUTE OF LIMITATIONS—WAIVER OF IN A COVENANT BY A GRANTEE.**—If a conveyance of mortgaged premises refers to a mortgage and declares that the grantee assumes its payment, that declaration waives so much of the statute of limitations as had run in favor of the mortgagor, and establishes a continuing and not a new contract. The mortgage continues as security for the period during which the original note as thus continued had to run. (*Daniels v. Johnson*, 123.)

3. **MORTGAGE—ASSUMPTION OF BY GRANTEE—RIGHT OF MORTGAGEE TO SUE THEREON.**—If a conveyance of property asserts the existence of a mortgage thereon, which the grantee assumes, the mortgagee may foreclose the mortgage in the event of its nonpayment when due, and hold such grantee liable for any deficiency for which the original mortgagor was liable. (*Daniels v. Johnson*, 123.)

4. **MORTGAGE—RENEWAL OR EXTENSION—WHAT IS NOT.**—A statute providing that a mortgage can be renewed or extended only by a writing executed with the formalities required of grants of real property is not applicable to a continuation of an original liability for a longer term before the statute of limitations had barred the right of action thereon. In such case the mortgage remains as security for the payment of the debt during the term as so extended. (*Daniels v. Johnson*, 123.)

5. **MORTGAGE—ASSUMPTION OF BY THE VENDEE—EFFECT OF UPON THE MORTGAGEE.**—If the mortgaged property is conveyed by the mortgagor to one who assumes the payment of the mortgage debt, this does not affect the rights of the mortgagee, unless he elects to rely upon such assumption and to accept the vendee as his debtor. If the vendee dies, the mortgagee is under no obligation to present any claim against his estate, and remains entitled to foreclose the mortgage and to a personal judgment against the original mortgagor for any deficiency which may exist after the sale thereunder. The mortgagor cannot, by any contract between himself and a third person, relieve himself from liability or otherwise bind the mortgagee. (*Hull v. Hayward*, 890.)

6. **MORTGAGES.—A MORTGAGEE'S DELAY IN ENFORCING HIS CLAIM OR HIS OMISSION TO PROCEED AGAINST THE VENDEE OF THE MORTGAGOR**, who has assumed the payment of the debt, cannot prejudice his right to foreclose his mortgage and to obtain judgment against the mortgagor for the deficiency. (*Hull v. Hayward*, 890.)

7. **MORTGAGOR'S LIABILITY ON JOINT AND SEVERAL NOTES.**—If cotenants execute notes and a mortgage to secure them, it may be assumed, in support of the judgment against one of their number for a deficiency remaining after a foreclosure sale, that such notes were joint and several, and that he was properly held liable for such deficiency. (*Hull v. Hayward*, 890.)

8. **AN ASSIGNEE OF A MORTGAGE** takes it subject to all the defenses which were valid between the original parties. This rule relates only to defenses arising out of the matters inherent in the contract by which the deed in question is evidenced and existing before it is signed. New equities arising or defenses accruing thereafter are not within its application. (*Merchants' Bank v. Weill*, 605.)

9. **ASSIGNMENT OF MORTGAGE—DEFENSES SUBSEQUENTLY ACCRUING.**—If, when an assignment of a mortgage is made, there is no defense thereto, the subsequent exercise by the mortgagor of an option conferred by an unrecorded and collateral agreement to rescind the sale of the property, and then be relieved of the obligation growing out of it, cannot create a defense in his favor assertable against the assignee. (*Merchants' Bank v. Weill*, 605.)

10. **JUDGMENT FORECLOSING A MORTGAGE—EFFECT OF UPON PARTIES HOLDING TITLE UNDER A CONVEYANCE ANTEDATING THE MORTGAGE.**—Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in a suit for its foreclosure. If one holding a conveyance of prior date to that of a mortgage is made a party defendant under a general allegation that he has some interest in the premises subsequent and subordinate to that created by the mortgage, and judgment is taken against him by default or upon an answer denying such averment, and is followed by a sale thereunder of the premises, the title of such prior grantee is not affected by such judgment and sale. (*Beronio v. Ventura etc. Co.*, 118.)

11. **MORTGAGE—FORECLOSURE OF UNDER A POWER.**—There is no necessity of a mortgagee's making any entry into the possession of mortgaged premises as a prerequisite for foreclosure. (*Karcher v. Gans*, 893.)

12. **SHERIFF.—THE OMISSION OF A SHERIFF TO INDORSE THE AMOUNT OF A BID ON A NOTE AND MORTGAGE** cannot prejudice a purchaser at a foreclosure sale. He has no control over the sheriff, and if the mortgagor suffers damage, his remedy is by an action against the sheriff. (*Karcher v. Gans*, 893.)

13. **REDEMPTION—AGENT'S AUTHORITY TO EXTEND TIME FOR.**—The authority of an agent to foreclose a mortgage does not authorize him to extend the period allowed for redemption from a sale thereunder. (*Karcher v. Gans*, 893.)

14. **MORTGAGE FORECLOSURE—EXTINGUISHMENT OF DEBT.**—While a foreclosure does not extinguish a mortgagor's equity of redemption until after the expiration of the statutory period for redemption, yet it does pass a defeasible title which may become absolute, and the sale to the mortgagee for the full

amount of the mortgage debt operates as an extinguishment thereof. (*Reynolds v. London etc. Ins. Co.*, 17.)

See Chattel Mortgage; Fraudulent Conveyance, 5; Guaranty, 2-4; Homestead, 4-6; Injunction, 5; Insurance, 1-3; Intervention.

MUNICIPAL CORPORATION.

1. **MUNICIPAL CORPORATIONS—WANT OF POWER—NOTICE.**—A person who deals with a municipal corporation is chargeable with knowledge of its want of power to act in the matter. (*Ecroyd v. Coggeshall*, 741.)

2. **MUNICIPAL CORPORATIONS—ORDINANCE REGULATING ERECTION OF BILLBOARDS.**—A municipal ordinance prohibiting the erection of billboards exceeding six feet in height, within the city limits, except with the permission of the common council, is authorized by a charter conferring power upon the city "to license and regulate billposters, and to prescribe the terms and conditions upon which any license shall be granted." (*Rochester v. West*, 659.)

3. **CONSTITUTIONAL LAW—REGULATION OF HEIGHT OF BILLBOARDS.**—A statute conferring upon the common council of a city authority to regulate the height of boards erected for the purpose of billposting, so far, at least, as such regulation is necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets, is valid and constitutional. (*Rochester v. West*, 659.)

4. **CONSTITUTIONAL LAW—VALIDITY OF STATUTES AND ORDINANCES** is not to be determined from their effect in a particular case, but upon their general purpose and their efficiency to effect that end, and when a statute is obviously intended to provide for the safety of the community, and an ordinance passed under it is reasonable and in compliance with its purpose, both the statute and the ordinance are valid and constitutional, and must be sustained. (*Rochester v. West*, 659.)

5. **MUNICIPAL CORPORATIONS—ORDINANCES LIMITING HEIGHT OF BILLBOARDS.**—A city ordinance prohibiting the erection of billboards more than six feet high within the city limits, without the consent of the common council, is not unreasonable, or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficial use of private property. (*Rochester v. West*, 659.)

6. **MUNICIPAL CORPORATIONS—ORDINANCE REGULATING STREET-CAR TRANSFERS—CONSTITUTIONALITY.**—A municipal corporation has power to pass any reasonable regulation affecting street-car lines to remedy an interference with the comfort, convenience, and general welfare of the traveling public. Hence an ordinance making it a misdemeanor for any person except the conductor or agent of the street-car line to give, sell, or issue any transfer check or ticket issued for passage on any street-car or line, the main purpose of which is to promote the convenience and welfare of the traveling public and not an attempt by penal legislation to enforce a private contract, is legitimate, and does not violate the constitutional guaranties protecting personal liberty or the right of private property. (*Ex parte Lorenzen*, 47.)

7. **MUNICIPAL ORDINANCE—REGULATING STREET-CAR TRANSFERS—RESTRICTING USE OF PRIVATE PROPERTY.**—A municipal ordinance which makes penal the disposal in any manner by a passenger of a street-car transfer check, but which leaves

him all the rights which he enjoyed under his contract, and at most merely makes penal what before was illegal and against good morals, is a legitimate restriction on the use of private property. (*Ex parte Lorenzen*, 47.)

8. MUNICIPAL ORDINANCE—GENERAL TERMS REASONABLE CONSTRUCTION—STREET-CAR TRANSFERS.—A municipal ordinance forbidding a passenger from disposing in any manner of a street-car transfer is not unreasonable and oppressive by reason of the generality of its terms, since the letter of a penal statute is not controlling, but will be given a liberal and equitable construction, making it apply according to its spirit to an act in its nature illegal or fraudulent, and no lawful or innocent use of the transfer will subject a passenger to the penalties of the ordinance. (*Ex parte Lorenzen*, 47.)

9. MUNICIPAL CORPORATIONS—EXPENSES OF OFFICER—LIABILITY FOR.—Expenses incurred by a member of a city council under authority of such council in visiting other cities, for the purpose of informing himself upon subjects connected with municipal matters, are not necessary expenses incurred in the performance of official duties, and the city is not liable therefor, although the claim has been audited and ordered paid by the city council. (*James v. Seattle*, 957.)

10. MUNICIPAL CORPORATIONS—RIGHT TO REFUSE TO PAY CLAIM.—If a city council is without power to authorize the payment of a claim against the city, the comptroller thereof may properly refuse to countersign the warrant directing its payment. (*James v. Seattle*, 957.)

11. MUNICIPAL CORPORATIONS—POLICE OFFICERS—UNLAWFUL DISCHARGE OF—RIGHT TO COMPENSATION.—If an appointive municipal officer, such as a policeman, is unlawfully dismissed and prevented from rendering any service, but makes no complaint to the mayor or to the city council, and no attempt to secure a reinstatement, but apparently acquiesces in the dismissal, he thereby abandons and relinquishes his office, or "resigns by implication," and cannot, therefore, recover of the municipality the compensation incident to the office during the period in which he performs no service. (*Byrnes v. St. Paul*, 384.)

12. MUNICIPAL CORPORATIONS—INJURY FROM OVERTAXED SEWERS—LIABILITY.—If a city turns into a sewer a much larger amount of surface water and sewage than was contemplated at the time of its construction, it is answerable in damages to an abutter who is injured thereby. Hence, it is liable if, after a sewer is constructed and an abutter has rightfully connected his premises therewith, it changes the grade of streets and turns into the sewer a large amount of surface water and sewage, formerly flowing in another direction, thereby overtaxing the sewer and causing a retroflux of sewage through such connection and upon the premises of such owner to the latter's injury. (*King v. Granger*, 779.)

13. RELEASE—INJURY FROM CONNECTION WITH SEWERS—CONSTRUCTION.—A release, required by statute, as a condition of an abutting property owner's making connection with a city sewer, must be construed in view of the facts and conditions existing at the time of its execution, as well as those reasonably to be anticipated. It does not bar him from all claims for damages which may subsequently arise by reason of such construction. Hence, if the city, after the construction of a sewer, changes the grade of streets and turns into the sewer a large amount of sur-

face water and sewage formerly flowing in another direction, thus overtaxing the sewer to such owner's injury, the city is answerable in damages notwithstanding such a release. (King v. Granger, 779.)

14. **RELEASE REQUIRED BY STATUTE—EQUIVALENT—SEWER CONNECTIONS.**—An agreement, by the owner of abutting property, who has been permitted to make connection with a city sewer, "that no claim for damages which may be occasioned to such estate, or any property thereon, in any manner, by the construction, use, or existence of such drain or connection, shall be made against the city," while not technically a release, must be held equivalent to the release required by statute as a condition of making such connection. (King v. Granger, 779.)

15. **MUNICIPAL CORPORATIONS—SEWERS—CHANGE OF PLAN.**—When a city desires to drain a much larger territory by the use of a sewer than was originally contemplated, and larger than the sewer is capable of draining, it must increase its capacity, for it cannot materially change its plan as to the territory to be drained without also changing its plan as to the size of the sewer. (King v. Granger, 779.)

16. **MUNICIPAL CORPORATIONS—SEWERS—DUTY AS TO—NEGLIGENCE—LIABILITY.**—When a plan for a sewer has been adopted by a city, and the sewer constructed in accordance therewith, judicial discretion ends and ministerial duty begins. The city then becomes answerable in damages for injuries to others resulting from the negligent discharge of such duty, or the negligent omission to discharge it. (King v. Granger, 779.)

17. **MUNICIPAL CORPORATIONS—AUTHORITY TO ISSUE BONDS TO PAY PRE-EXISTING INDEBTEDNESS,** or to raise moneys with which to pay it, is conferred by a statute giving a municipality power to borrow money on the credit of the corporation for corporate purposes. (National Life Ins. Co. v. Mead, 876.)

18. **MUNICIPAL BONDS—ESTOPPEL AGAINST CORPORATION.**—Evidence that a municipality employed persons to dispose of its bonds, and furnished them with certificates or statements of fact concerning its financial condition, should not be received for the purpose of estopping the municipality from showing that the bonds are in excess of the indebtedness it might incur under the constitution and statutes of the state. (National Life Ins. Co. v. Mead, 876.)

19. **MUNICIPAL BONDS—KNOWLEDGE WITH WHICH PURCHASER IS CHARGEABLE.**—A purchaser of negotiable municipal bonds is held to know the constitutional and statutory restrictions, and the authority to issue them, and the valuation of the taxable property of the municipality as ascertained by its assessment. (National Life Ins. Co. v. Mead, 876.)

20. **MUNICIPAL BONDS—LIABILITY OF MUNICIPALITY.—IN CONSIDERING THE AMOUNT OF THE LIABILITY WHICH A CITY MAY INCUR,** the debts of a school district cannot be included, though its territorial limits coincide with those of the city. (National Life Ins. Co. v. Mead, 876.)

21. **MUNICIPAL BONDS.—AN ESTOPPEL TO PROVE THAT THE MUNICIPAL BONDS ARE IN EXCESS OF THE AMOUNT OF INDEBTEDNESS** which the municipality was allowed to incur cannot arise from any recital in the bonds or any representation or certificate made by any of the municipal officers, if it was required to keep, and did keep, regular books of account showing all the municipal indebtedness, and the amount of its

taxable property also appears from public records open to the inspection of all persons. (National Life Ins. Co. v. Mead, 876.)

22. MUNICIPAL BONDS TO DISCHARGE PRE-EXISTING OBLIGATIONS, WHETHER AN INCREASE OF INDEBTEDNESS.—The issuing of bonds, whether to be exchanged for pre-existing indebtedness, or to be sold and their proceeds applied to its satisfaction, does not constitute an increase of indebtedness within the meaning of statutory and constitutional restrictions upon the amount of indebtedness which may be created by or against a municipal corporation. (National Life Ins. Co. v. Mead, 876.)

See Attachment, 6, 7; Constitutional Law, 9, 17; Dedication.

MUTILATED NOTE.

See Negotiable Instrument, 3.

NATURALIZATION.

See Citizenship.

NEGLIGENCE.

1. NEGLIGENCE—EXPLOSIVE CAPS KEPT BY CITY IN VACANT LOT—BREAKING OF CAUSAL CONNECTION—NON-LIABILITY.—If a city keeps explosive caps in a tool-chest on a vacant lot, for highway work, it is not negligent in leaving the chest open and unguarded, so that the caps may be removed by mischievous persons, but conceding that it is, and a number of the caps have been removed by someone, the act of a boy in exploding one of the caps picked up some ten or twelve feet distant from the chest, whereby another boy, the plaintiff, was injured, is the proximate cause of the injury, intervening between the negligence of the city and the injury to the plaintiff and breaking the causal connection between them, so that the city is not answerable for such injury. (*Afflick v. Bates*, 801.)

2. NEGLIGENCE—CONTRIBUTORY.—THE DOCTRINE OF COMPARATIVE NEGLIGENCE does not prevail in Illinois. Where a party seeks to recover damages for a loss which has been caused by negligence, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury, and the burden is upon him to show not only negligence on the part of the defendant, but also that he was not guilty of negligence. (*West Chicago St. R. R. Co. v. Liderman*, 226.)

3. NEGLIGENCE—RISKING LIFE TO SAVE ANOTHER—EXCEPTION.—A person has a right to risk his own life or limb in an effort to save the life of another person, and cannot be charged with contributory negligence in so doing, unless his act is rash or reckless; but such rule does not apply if the person attempted to be rescued was placed in the position of danger through the fault of the person injured. (*West Chicago St. R. R. Co. v. Liderman*, 226.)

4. NEGLIGENCE—RISKING LIFE TO SAVE ANOTHER—QUESTION FOR JURY.—Whether one who risks his life to save another acted with reasonable prudence or with recklessness is a question for the jury under all the facts and circumstances of the case, where reasonable minds might draw different conclusions therefrom. (*West Chicago St. R. R. Co. v. Liderman*, 226.)

5. NEGLIGENCE OF PARENTS—CHILDREN ON STREET.—

While it is the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets, it is not negligence per se to permit infants to be upon the streets of a city. (West Chicago St. R. R. Co. v. Liderman, 226.)

6. NEGLIGENCE—CONTRIBUTORY.—TO JUSTIFY A NON-SUIT on the ground of contributory negligence the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy. (West Chicago St. R. R. Co. v. Liderman, 226.)

7. NEGLIGENCE—PARENT AND CHILD—MOTHER RESCUING CHILD.—A mother whose child has momentarily escaped from her has a right reasonably to presume that if the child became exposed to danger others would not negligently injure it, and seeing it so exposed, she had a right to make all reasonable efforts to rescue it. (West Chicago St. R. R. Co. v. Liderman, 226.)

8. NEGLIGENCE—OMISSION OF DUTY DUE TO ANOTHER CLASS OF PERSONS.—In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute for the benefit of somebody else, and that such person would not have been injured if the duty had been performed, but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection. (Hamilton v. Minneapolis Desk Mfg. Co., 350.)

9. REAL PROPERTY—DUTY AS TO SAFE CONDITION OF BUILDINGS FOR FIREMEN.—The owner or occupant of a building owes no duty at common law to keep it in a reasonably safe condition for members of a public fire department who may, in the exercise of their duties, have occasion to enter the building. (Hamilton v. Minneapolis Desk Mfg. Co., 350.)

10. EVIDENCE — BURDEN OF PROOF — NEGLIGENCE. —Where the case is not one which permits the inference of negligence from the happening of an accident, the defendants are entitled to rest on the presumption that they performed their duty as masters until affirmative evidence to the contrary is given. (Dougherty v. Milliken, 608.)

11. EVIDENCE—NEGLIGENCE NOT IMPLIED.—The fact that the eyebolt to which two derricks were fastened broke, causing them to fall and inflict injuries on an employé, does not tend to prove negligence on the part of anyone. (Dougherty v. Milliken, 608.)

12. NEGLIGENCE CAUSING DEATH—WIDOW'S ACTION FOR DEATH OF HUSBAND—CONTRIBUTORY NEGLIGENCE—EFFECT OF—DIMINUTION OF DAMAGES.—Under the statutes of Florida, a widow may recover damages for the death of her husband, caused by the wrongful act, negligence, or carelessness of a railroad company; and, in such action, contributory negligence on the part of the deceased operates, not as a bar to the plaintiff's recovery, but merely in diminution of damages. (Florida etc. R. R. Co. v. Foxworth, 149.)

13. NEGLIGENCE CAUSING DEATH—ACTION FOR—CONTRIBUTORY NEGLIGENCE—EFFECT OF—DIMINUTION OF DAMAGES.—Under the statutes of Florida, which make contributory negligence, in actions for personal injuries, operate merely in diminution or reduction of damages, the person injured, or, in case of his death, his widow, is entitled to recover, where the defendant's negligence was one of the proximate contributing causes to the

injury, although the injured person's negligence was greater than that of the defendant, but in all cases where the negligence of the plaintiff and the defendant produces the injury, the plaintiff's damages are to be diminished by the jury in proportion to the default attributable to such injured person. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

14. **DEATH—DEPENDENCE FOR SUPPORT WHICH WILL JUSTIFY RECOVERY FOR.**—In an action by a mother to recover for the death of her adult son, she sufficiently shows that she was dependent on him for support if she produces testimony to the effect that she was very poor, that he sent moneys repeatedly with which she bought food, and that for two years past she had almost entirely depended on him. Partial dependence for the necessities of life is enough. (*Mulhall v. Fallon*, 309.)

15. **DEATH OF RELATIVE—NONRESIDENT ALIEN'S RIGHT TO RECOVER FOR.**—A mother who has never been in this state, and who is a citizen and resident of Ireland, is entitled to recover in the courts here for the death of her son without conscious suffering due to the wrongful act of another. (*Mulhall v. Fallon*, 309.)

See Damages, 1-6.

NEGOTIABLE INSTRUMENT.

1. **NEGOTIABLE INSTRUMENTS—AGREEMENT TO PAY DEBT OF THIRD PERSON, WHETHER A NOTE.**—A written agreement by one person to pay another a certain sum due from a third person on or before a certain day is not a promissory note importing a consideration, and to sustain a judgment based thereon, a consideration must be proved to exist. (*Bradt v. Krank*, 662.)

2. **NEGOTIABLE INSTRUMENTS—INDORSEMENT BEFORE DELIVERY.**—If a note is indorsed before its delivery to the payee at the request of the maker with knowledge on the part of the indorser that his name is required by the payee as a condition of making or procuring the loan, and as security for its payment, he is placed in the same condition in relation to the payee as though he indorsed the note by express agreement with him, and may be held liable as a first indorser. (*Davis v. Bly*, 670.)

3. **NEGOTIABLE INSTRUMENTS—INDORSEMENT WITH QUALIFICATION—DEFENSES.**—The transfer of a negotiable note before maturity for value, by pinning to the note a written paper setting forth a qualified indorsement, when there is ample space upon the note for the indorsement, is not sufficient to invest the transferrer with all the rights of a bona fide purchaser. Such indorsement is a mere assignment, and the note in the hands of the assignee without knowledge of its payment, before the transfer, is subject to all the equities of a non-negotiable instrument, or such as it would have been subject to in the hands of the original payee. (*Bishop v. Chase*, 515.)

4. **NEGOTIABLE INSTRUMENTS—QUALIFIED INDORSEMENT—DEFENSE OF PAYMENT.**—The transferee of a negotiable mortgage note taken by qualified indorsement amounting to no more than a mere assignment, although transferred before maturity and for value, takes it and the mortgage incident thereto, subject to all defenses thereafter available against it by the payor or mortgagor, one of which is payment, and such defense is available to the purchaser from the mortgagor. A sale of the property by such transferee of the note under the power contained in the mortgage is void if made after the payment of the note. (*Bishop v. Chase*, 515.)

5. NEGOTIABLE INSTRUMENTS — MUTILATION — PLEADING.—In a statement of claim against the estate of a decedent or other pleading, based upon a note so mutilated and torn that the signature of the maker does not fully appear thereon, and alleging that the torn portion is lost, it must also be alleged that such mutilation was innocently done, and was the result of accident or mistake, to entitle the instrument to be admitted in evidence. (*McCulloch v. Smith*, 281.)

6. NEGOTIABLE INSTRUMENTS — CITY WARRANTS — TITLE OF PURCHASER.—A city warrant for all purposes involving its title is negotiable, and, if taken, when indorsed in blank, from its apparent owner by a bona fide purchaser, the latter acquires title, although the seller is the mere custodian thereof, and not the real owner. (*Fidelity Trust Co. v. Palmer*, 953.)

See Banks and Banking, 1-3.

NONSUIT.

TRIAL—NONSUIT.—If there is evidence tending to show negligence, a nonsuit is properly refused. (*Mason v. Southern Ry. Co.*, 826.)

NUISANCE.

NUISANCE.—A GRANTEE OR LESSEE is liable for the continuance of a private nuisance only when he has increased it, or has been notified thereof, and demand has been made for its removal. (*De Laney v. Georgia etc. Ry. Co.*, 843.)

See Damages, 8.

OFFICER.

1. OFFICIAL BONDS—RIGHT OF SURETIES TO QUESTION AUTHORITY OF THEIR PRINCIPAL TO RECEIVE MONEYS.—If a county treasurer receives partial payments of personal property taxes, giving his receipt as treasurer therefor, his sureties cannot escape liability on the ground that he was not authorized to receive such payments, and did not charge himself therewith in the regular accounts of his office. The claim that he holds such money merely in trust for the persons paying it is not sustainable. (*Custer County v. Tunley*, 870.)

2. OFFICIAL BONDS—SURETIES FOR SECOND TERM.—The sureties on an official bond of an officer are answerable for moneys received by him in the preceding term, if, during the term for which they are sureties, he reported such moneys to the county commissioner and charged himself therewith. It will be presumed that he then paid them over to himself as his own successor. (*Custer County v. Tunley*, 870.)

3. OFFICIAL BONDS—SURETIES—WHAT IS NOT AN ACCOUNT STATED OR AN AGREEMENT BETWEEN THEM AND THE COUNTY.—An agreement between a county and the sureties of the treasurer thereof that certain actions shall be brought by the county, and that nothing contained in the agreement shall affect the liability of the sureties for the payment of about seven hundred dollars, claimed to be due from their principal for partial payment of taxes, does not amount to an account stated, nor preclude the county from obtaining judgment for a greater sum, if found to be due. (*Custer County v. Tunley*, 870.)

4. OFFICIAL BOND—LIABILITY OF THE SURETIES FOR THE SECOND TERM.—Where a county treasurer holds office for

two terms, the sureties for the second term are not answerable for moneys collected during the first and not accounted for by him nor charged to himself during the second term. (Custer County v. Tunley, 870.)

5. OFFICIAL BOND — ESTOPPEL AGAINST PRINCIPAL AND SURETIES.—Where a county treasurer in his report to the county commissioners states that he has received a sum of money from his predecessors in office, and charges himself therewith, both he and the sureties on his official bond are estopped from showing that he did not receive such sum. (Custer County v. Tunley, 870.)

6. OFFICIAL BONDS—SURETIES, WHEN NOT ENTITLED TO CREDIT FOR OLD PAYMENTS.—If a county treasurer makes overpayments to a city and to certain school districts, from which the county derives no benefit, neither he nor his sureties are entitled to a credit therefor as against the county. (Custer County v. Tunley, 870.)

See Municipal Corporation, 9, 11.

PARENT AND CHILD.

See Domicile; Railroads, 2, 3.

PARTIES.

1. ACTIONS — PARTIES — BRINGING IN NEW PLAINTIFF.—The power of amendment does not extend to the compulsory bringing in by the defendant of a new party as plaintiff. The defendant comes into court under compulsion, but the plaintiff must come voluntarily, and there is no process known to the law by which one person can compel another to sue him. (Frisbie v. McFarlane, 696.)

2. ACTIONS — PARTIES — BRINGING IN NEW PLAINTIFFS.—After verdict, parties who have not brought the suit and have never been of record, and as to whom the jury has not been sworn, cannot be added as plaintiffs by praecipe, from the defendant's attorney, and judgment against such plaintiffs is void. (Frisbie v. McFarlane, 696.)

3. ACTIONS — PARTIES — BRINGING IN NEW PLAINTIFFS.—If defendant is sued by parties whom he claims are not all of the real plaintiffs, he may, nevertheless, prove his setoff against the plaintiffs of record; but if he wants a certificate in his favor against the absent parties, he should plead in abatement, and if the facts are disclosed for the first time during the progress of the suit, he may be allowed to make the same plea *puls darrien* continuance. But there is no way by which he can put them on record against their will and enter judgment against them. (Frisbie v. McFarlane, 696.)

See Receiver, 2.

PARTNERSHIP.

1. PARTNERSHIP — FARMING CONTRACT. — An agreement reciting that the "party of the first part has this day rented and farm let unto the party of the second part his farm for the term of one year, with the privilege of continuing the same from year to year on the terms hereinafter mentioned, and at the expiration of each year during the term of such tenancy they shall meet on proper notice, adjust their business and claims pertaining to said renting, the party of the second part to have charge of said farm and to have full power to make all necessary purchases therefor,

and to buy and sell such stock, and for such price as may be mutually agreed upon, two-thirds of the net profits to go to the party of the first part, and one-third thereof to the party of the second part, and losses and expenses to be apportioned," in like manner, does not constitute a partnership, but merely a contract for compensation for services. (*Bradley v. Ely*, 251.)

2. **PARTNERSHIP. — PARTICIPATION IN PROFITS** and losses of a business does not constitute a partnership, but there must be such community of interest as enables each party to make contracts, manage the business, and dispose of the whole property. This rule is the same as to third persons, unless the party sought to be charged has so acted as to lead plaintiff to believe a partnership to exist, and to act upon such belief. If one of the parties is not to receive a part of the profits in specie, but a sum of money calculated in proportion to a given quantity of the profits, then, even as to third persons, he is not a partner, but an agent or servant. (*Bradley v. Ely*, 251.)

3. **PARTNERSHIP—ACTION TO DISSOLVE—PLEADING.**—If an action is commenced by one partner against another to dissolve a partnership created for a term of years on the ground of misconduct of the partner in respect to the partnership business, it is not essential that the latter allege in his answer the commencement of such action, and that he has thereby been damaged in order that he may avail himself of the wrong and injury done him in commencing the action. (*Corcoran v. Sumption*, 428.)

4. **PARTNERSHIP—PURCHASE OF INTEREST—CONSIDERATION.**—If a member of a partnership created for a term of years has paid a premium for an interest therein, the consideration for such payment is not only the creation of the partnership, but also its continuance for the term agreed upon. (*Corcoran v. Sumption*, 428.)

5. **PARTNERSHIP—DISSOLUTION—DAMAGES.**—If a partner to whom a premium has been paid for an interest in a partnership is guilty of misconduct bringing about a dissolution of the partnership before the end of the term for which it was formed, the premium may be apportioned, and a part thereof returned, and the amount thereof may be determined and awarded as damages in an action to dissolve the partnership. (*Corcoran v. Sumption*, 428.)

6. **PARTNERSHIP — CONTINUANCE AFTER DEATH OF MEMBER.**—IT IS NOT FRAUD, ACTUAL OR CONSTRUCTIVE, upon creditors for a debtor to enter into a partnership agreement in a legitimate business for a term of years, with a stipulation that the death of a member during that period shall not work a dissolution of the firm, but that his interest shall remain in the partnership and his representatives have no voice or control in the management. (*Brew v. Hastings*, 706.)

7. **PARTNERSHIP — CONTINUANCE AFTER DEATH OF MEMBER.**—Stipulation in articles of partnership for the continuance of the firm after the death of a member, and until the consent of all of the partners is given to a dissolution, are valid and binding, and on the death of an individual partner will prevent a dissolution. (*Brew v. Hastings*, 706.)

See Receiver, 2.

PAYMENT.

See Evidence, 4.

PEDIGREE.

See Evidence, 6-10.

PHARMACY ACT.

See Constitutional Law, 12-15.

PHYSICAL EXAMINATION.

See Trial, 2.

PHYSICIAN.

1. A PHYSICIAN IS AN INDEPENDENT CONTRACTOR when employed by a corporation to make a personal examination of the litigant. Hence, such corporation is not answerable for any suggestions given by such physician to such litigant. (*Pearl v. West End St. Ry. Co.*, 302.)

2. A PHYSICIAN IS NOT THE AGENT OR SERVANT of the person employing him to make a physical examination of another where it does not appear, but that it was left wholly to the physician to determine what he should do and how he should do it. (*Pearl v. West End St. Ry. Co.*, 302.)

PLEADING.

1. PLEADING—DEFECT OF PARTIES.—The question of defect of parties cannot be raised by demurrer for want of facts. (*Supreme Tribe of Ben Hur v. Hall*, 262.)

2. PLEADING—REFERENCE TO COUNTS—EFFECTIVENESS OF.—It is permissible to refer to, and thereby make a part of one count, the whole or a part of the allegations of another count in the same declaration. The practice, however, is not to be commended, and, to be effective, the reference should be definite and certain. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

See Action; Appeal; Limitation of Action; Parties.

POLICE OFFICER.

See Municipal Corporation, 11.

PORTRAIT.

See Contract, 3, 4.

PRE-EMPTION CLAIM.

See Public Land.

PROBATE PROCEEDINGS.

See Executor and Administrator.

PROCESS.

SUMMONS—ERRONEOUS DATE—EFFECT.—A date is no part of the form of a summons. Hence where a summons is in fact properly issued within the time allowed by law, the fact that it was erroneously dated a month prior to the commencement of the action is not conclusive proof that it was issued then, and it is not void. (*Hibernia Sav. etc. Soc. v. Churchill*, 73.)

PROMISSORY NOTE.

See Negotiable Instrument.

PUBLIC LAND.

1. PUBLIC LAND—VESTED RIGHTS OF APPLICANT.—An applicant for state tide lands who has complied with all preliminary requirements of the existing law entitling him to a contract of purchase has a vested right in such land and to such contract, of which he cannot be deprived, notwithstanding the repeal of the statute under which his application was made. (*State v. Bridges*, 914.)

2. PRE-EMPTION CLAIM.—A PRE-EMPTOR ACQUIRES NO ESTATE, legal or equitable, in public land until the amount of the purchase money has been paid. By filing his declaratory statement he merely acquired the privilege of making payment for the land and receiving a patent therefor from the United States in preference to any other applicant. (*Wittenbrock v. Wheadon*, 32.)

3. PRE-EMPTION CLAIM—EFFECT OF DEATH.—IN THE ABSENCE OF ANY STATUTE upon the subject, the privilege given by the government to a pre-emptor of public land to receive a patent therefor upon payment of the purchase money would lapse with his death. (*Wittenbrock v. Wheadon*, 32.)

4. PRE-EMPTION CLAIM—TITLE OF HEIRS.—Under a United States statute allowing the heirs of a deceased pre-emptor to complete his claim by filing the necessary papers and paying the purchase price, such heirs do not take the title by descent from their ancestor, but the land is conveyed to them directly from the United States by virtue of the privilege of purchase given to them by the statute. (*Wittenbrock v. Wheadon*, 32.)

5. PRE-EMPTION CLAIM—ESTATE OF DECEASED PRE-EMPTOR.—Land taken by a pre-emptor who has not completed his purchase forms no part of his estate; hence, it cannot be devised nor subjected to the jurisdiction of a probate court; neither can it be sold to satisfy the pre-emptor's debts or to pay the expenses of administration, nor can it be affected by a decree of distribution. (*Wittenbrock v. Wheadon*, 32.)

6. PRE-EMPTION CLAIM—DECLARATION OF HOMESTEAD—EFFECT ON HEIRS.—A pre-emptor, prior to the payment of the purchase money, has no title in the land, but merely a privilege which terminates at his death, and a declaration of homestead filed by him under the state laws cannot affect the title of the heirs under a subsequent patent from the United States, since such patent is not the perfecting of a title which was inchoate in the pre-emptor at the time of his death, but is a new and independent source of title. (*Wittenbrock v. Wheadon*, 32.)

7. PRE-EMPTION CLAIM—TITLE OF HEIRS—LAW OF INHERITANCE.—Where a pre-emptor dies before completing his purchase, the heirs do not take the land by inheritance from their ancestor, but by direct conveyance from the United States; hence the portion taken by each heir is not determined by the law of inheritance, but by the terms of the conveyance. (*Wittenbrock v. Wheadon*, 32.)

QUARRYING ROCK.

See Cotenancy, 6.

RAILROAD.

1. RAILROADS — FELLOW-SERVANT — EMPLOYÉ RIDING HOME.—If a snow shoveler for a railroad company is invited, after

his day's work in removing snow from the track is done, to ride upon a certain car of the company toward his home, and he accepts, he is not a passenger. Hence, if he is thrown from the car while so riding by the careless management of the train, and receives injuries resulting in his death, there can be no recovery therefor, as they must be deemed to have been caused by the negligence of a fellow-servant. (*Ionnone v. New York etc. R. R. Co.*, 812.)

2. RAILROADS—PARENT AND CHILD—EXPULSION FOR NONPAYMENT OF FARE.—If a parent enters a railway train with his child non sui juris and subject to the payment of fare, and refuses to pay the fare of such child, both may be expelled from the train, though the parent has paid his own fare. (*Braun v. Northern Pac. Ry. Co.*, 497.)

3. RAILROADS—PARENT AND CHILD—EXPULSION FOR NONPAYMENT OF FARE—DAMAGES.—The expulsion of a child, liable to pay fare, from a railway train for the failure of the parent to pay such fare, is, whether rightful or wrongful, the expulsion of the parent also, and if the parent has paid his own fare, such expulsion without first having returned, or offered to return the latter's ticket or the unearned value thereof, is a violation of the contract to carry the parent to his destination, and such a wrong as to render the railway company liable in damages. (*Braun v. Northern Pac. Ry. Co.*, 497.)

4. RAILROADS—BACKING TRAINS IN VILLAGE—NEGLIGENCE.—It is negligence for a railway company to back a train without a brakeman at the rear end as a lookout across the main thoroughfare of a village, when there is no flagman at the crossing, even at a rate but little faster than a person walks. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

5. RAILROADS—BACKING TRAINS IN VILLAGE—DUTY—NEGLIGENCE.—A railroad company operating its trains on the thoroughfare of a village must use greater care than in less frequented localities, and any neglect of any precautions, proper with respect to the peculiar circumstances of the locality, constitutes negligence, although the road was in operation before the village came into existence. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

6. RAILROADS—CROSSING TRACK IN STREET—TRESPASSERS.—A person is not a trespasser who crosses a railroad track in a street of a village at a place other than a public crossing or the intersection of other streets. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

7. RAILROADS—INJURY NEAR PUBLIC CROSSING—LIABILITY.—If a person is injured by moving cars while attempting to cross a railroad track in a village, and the injury occurs so near a public crossing that the means required to be adopted, by those operating the train, to enable a traveler to cross in safety at the public crossing, if carried out, would have enabled the person injured to cross in safety at the place of the accident, the liability of the railroad company will be measured by the legal principles applicable to public crossings. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

8. RAILROADS—DUTY IN BACKING CARS IN TOWNS OR VILLAGES.—It is the duty of a railroad company, while operating its trains in the streets of towns and villages, and in the immediate vicinity of public crossings, to keep a lookout when making flying switches, or backing cars by the "kicking back" process, and, when it is apparent, or when, in the exercise of reasonable diligence commensurate with the surroundings it should be apparent to the

company that a person on its track, or about to get thereon, is unaware of his danger, or cannot get out of the way, it becomes the duty of the company to use such precautions by warnings, applying brakes, or otherwise, as may be reasonably necessary to avoid injury. (Florida etc. R. R. Co. v. Foxworth, 149.)

9. RAILROADS—INJURY FROM MOVING CARS IN TOWNS OR VILLAGES—CONTRIBUTORY NEGLIGENCE—LIABILITY.—It is the duty of a person who attempts to cross a railway track in a town or village to look and listen before crossing, and his failure to do so is contributory negligence, but this, under the statute of Florida, does not exonerate the railway company from liability, in case of injury, where it could have been prevented by the exercise of reasonable and proper care, after the discovery of such person's negligent act, or where it could have discovered it by the exercise of such care, in time to avoid the injury. If the company, by failing to ring a bell, blow a signal, or station a lookout, directly contributed to the injury, it would, under such statute, be answerable in damages, to be diminished in proportion to the contributory negligence of the injured party, but if such negligent omissions on its part did not directly contribute to the injury, it would not be liable. (Florida etc. R. R. Co. v. Foxworth, 149.)

10. RAILROADS—"KICKING CARS"—DUTY OF COMPANY.—The dangerous practice of "kicking cars," or making flying switches, in populous localities and near crossings, imposes upon railway companies the duty of stationing a lookout upon the rear of the cars, the equivalent of which is not accomplished by ringing the engine bell. (Florida etc. R. R. Co. v. Foxworth, 149.)

11. RAILROADS—NOTICE THAT TRAIN IS APPROACHING—DUTY CONCERNING.—A statute requiring a railway company to ring its engine bell before crossing the streets of an incorporated town does not define its duty, in this respect, outside of incorporated towns. It is a general rule, that those in charge of a train must measure their precautions by, and make them reasonably commensurate with, the conditions and circumstances by which they are surrounded, and they must, therefore, independently of statute, give notice of its approach at all points of known or reasonably apprehended danger. (Florida etc. R. R. Co. v. Foxworth, 149.)

12. NEGLIGENCE—WILLFULNESS—ACTS OF EMPLOYÉS.—If a locomotive engineer, in operating his engine, runs it at a higher rate of speed than that allowed by a city ordinance, and neglects his duty in giving required signals at crossings, such acts of negligence do not constitute willfulness or wantonness on his part. (Huff v. Chicago etc. R. R. Co., 274.)

13. NEGLIGENCE—WILLFULNESS—INTENT—ACTS OF EMPLOYÉS.—Before "willful" negligence can be attributed to servants or employés in the operation of a train of cars, facts must be averred and proved that will charge them with knowledge, actual or imputed, of impending danger, and until then no duty of the railroad company arises, requiring of it affirmative acts or effort to avoid resulting injury. (Huff v. Chicago etc. R. R. Co., 274.)

14. RAILWAYS—DUTY OF RESPECTING CARS RECEIVED FROM OTHER CORPORATIONS.—It is the duty of a master to furnish his servants with safe and suitable appliances, so far as reasonable care will accomplish this result, and this duty applies to cars received from other companies as well as defendant's own. A railroad company is bound to inspect the cars of another company used upon its road just as it would inspect its own. (Eaton v. New York etc. R. R. Co., 600.)

15. RAILWAY CORPORATIONS — FELLOW-SERVANTS OF, WHO ARE NOT.—Inspectors of cars are not fellow-servants with brakemen, so as to relieve the corporation from liability to the latter for injuries caused by the negligence of the former. The duty of the master cannot be delegated so as to relieve him from this responsibility. (*Eaton v. New York etc. R. R. Co.*, 600.)

16. RAILWAYS—CONSTRUCTION OF RULE REQUIRING BRAKEMEN TO INSPECT CARS.—A rule requiring that at all stoppings of trains the brakemen or trainmen must inspect the wheels, brakes, and trucks of the car, and report any defects immediately to the conductor, does not exact of them the special skill required of car inspectors, nor does it make the brakemen and inspectors thereof fellow-servants, nor preclude the recovery from the employer by the former for injuries received through the negligence of the latter. (*Eaton v. New York etc. R. R. Co.*, 600.)

17. RAILWAYS — CONTRIBUTORY NEGLIGENCE OF BRAKEMAN.—The failure of a brakeman to discover defects which would constitute negligence in a car inspector does not necessarily establish contributory negligence on the part of the brakeman, though one of the rules of the employing corporation declares it to be the duty of all brakemen to inspect the wheels, brakes, and trucks of the car at all stopping places and report immediately to the conductor. (*Eaton v. New York etc. R. R. Co.*, 600.)

18. RAILROADS—NEGLIGENCE—FAILURE TO GIVE SIGNALS.—The failure of a railway company to give signals at a public crossing one mile from the place of accident is evidence of gross negligence on running the train. (*Mason v. Southern Ry. Co.*, 826.)

19. RAILROADS—NEGLIGENCE—EVIDENCE.—In an action against a railway company to recover for the negligent killing of an infant, the ruling out of a question calling for the opinion of the engineer of the train as to what he would have done under the circumstances if his own child had been on the track is harmless error. (*Mason v. Southern Ry. Co.*, 826.)

20. EVIDENCE—RES GESTAE—CONTRADICTION OF WITNESS.—In an action against a railway company for negligently killing an infant, statements made by the engineer in charge of the train, though not properly part of the *res gestae*, are admissible to contradict him. (*Mason v. Southern Ry. Co.*, 826.)

21. RAILROADS — TRESPASSERS — NEGLIGENCE. — While technically an infant of a few months, or of very tender years, may be a trespasser when it goes upon a railway track without permission or lawful authority, yet there are well-defined distinctions between adult and infant trespassers, and, in case of injury to an infant, such distinctions should be pointed out to the jury. (*Mason v. Southern Ry. Co.*, 826.)

22. RAILROADS—NEGLIGENCE—INFANTS.—If the direct and proximate cause of an infant's death is the negligence of a railway company in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence after discovering the child upon the track. (*Mason v. Southern Ry. Co.*, 826.)

23. STREET RAILWAYS — PASSENGER, WHEN ONE CEASES TO BE.—One who has left a street-car for the purpose of entering her dwelling-house on the opposite side of the street is no longer a passenger. (*Gargan v. West End St. Ry. Co.*, 298.)

24. STREET RAILWAYS—OBSTRUCTION OF HIGHWAYS.—A fender projecting from the rear of a street-car is not an ob-

struction to the highway, nor is its presence such a negligent occupation of the highway as to make the corporation liable for injuries received by one who, while it is quite dark, goes so near the end of the car that he strikes it and falls, and thereby suffers injury. (*Gargan v. West End St. Ry. Co.*, 298.)

25. **NEITHER RAILWAYS NOR PALACE SLEEPING-CAR COMPANIES OWE TO A PASSENGER, IN REGARD TO BAGGAGE**, the duties imposed by law on carriers or innkeepers, where the passenger keeps the baggage in his custody and control. Their only obligation is that of exercising reasonable care, and their liability is restricted to the negligence or misconduct of their servants or agents. (*Whicher v. Boston etc. R. R. Co.*, 314.)

26. **RAILWAYS—PALACE CAR COMPANIES.—NEGLIGENCE IS NOT INFERABLE** on the part of a palace sleeping-car company, its agents or employes, from the mere loss, in the daytime, of the baggage of a passenger left by him or by the porter in his section. (*Whicher v. Boston etc. R. R. Co.*, 314.)

27. **RAILWAYS—PALACE SLEEPING-CAR COMPANIES.—NEGLIGENCE OF PASSENGER.**—A passenger who, after his traveling-bag is, in the daytime, placed in his section by the porter of a palace sleeping-car company, leaves such bag without attention for five hours, during which time it is stolen, does not exercise reasonable care, and cannot recover of the company. (*Whicher v. Boston etc. R. R. Co.*, 314.)

28. **RAILWAYS.—IN THE RUNNING OF A PALACE SLEEPING-CAR COACH IN THE DAYTIME** there is no necessity for the care required when passengers are sleeping. All that is required is reasonable care, and this is not negatived by the loss of a passenger's traveling-bag placed in his section by him or the porter and left there without attention for five hours. (*Whicher v. Boston etc. R. R. Co.*, 314.)

REAL ESTATE AGENT.

See Broker.

REAL PROPERTY.

See Deed; Estate.

RECEIVER.

1. **RECEIVER—CONTRACT FOR THE APPOINTMENT OF—WHEN VOID.**—A stipulation in a mortgage that, on default in the payment of the debt and on the filing of a complaint for foreclosure, the court shall, if requested by the plaintiff, appoint a receiver to take possession of the mortgaged premises and to collect the rents and profits thereof, is inoperative. Where a court has no authority under the law to appoint a receiver, none can be conferred by the consent or contract of the parties. (*Baker v. Varney*, 140.)

2. **RECEIVERS—PARTNERSHIP—SUIT AGAINST—NECESSARY PARTIES.**—A receiver of partnership property, appointed in a suit brought for a dissolution of the partnership, has such an interest in such property, legal and equitable, as to make him a necessary party in an action to foreclose a lien thereon. (*Denny v. Cole*, 940.)

3. **RECEIVERS, FOREIGN—TITLE TO CHOSSES IN ACTION.** A receiver of the property of a resident of one state appointed in a creditor's suit in that state, to whom all property of the debtor is

transferred by order of the court, thereby acquires title and the right to recover upon a debt due the debtor from a resident of another state. The situs of such debt is at the domicile of the creditor. (*Gilbert v. Hewetson*, 486.)

4. TRUSTS AND TRUSTEES—DEALING WITH TRUST PROPERTY—AGENT OF RECEIVER.—A trusted clerk and confidential adviser of a receiver having full charge of the conduct of the receivership, subject to the approval of the receiver, is not permitted to take advantage of his position to deal or traffic in the property or property rights of the receivership to his own advantage or benefit, and to the detriment of the trust. (*Gilbert v. Hewetson*, 486.)

See Trusts, 1, 2.

REDEMPTION.

See Mortgage, 15; Injunction, 5.

REFEREE.

See Appeal, 9.

RELEASE.

1. RELEASE—PLEADING—CONCLUSION OF LAW.—An averment in a replication that the plaintiff was incapacitated from making a valid release is a conclusion of law rather than a statement of fact, when the question as to whether he was so incapacitated depends on the question whether or not his understanding had been so impaired by his sufferings and the influence of opiates as to render him incapable of understanding the nature and effect of the release. (*Cooney v. Lincoln*, 799.)

2. RELEASE—PLEADING—DEFECTIVE REPLICATION.—In an action of trespass on the case for negligence, wherein the defendant pleads a general release from the plaintiff, the replication, to be a sufficient answer to the release, should aver either that the plaintiff's lack of mental capacity at the time of making the release was so great as to render him incapable of understanding the effect of the instrument, or, if his mental incapacity did not go to that extent, that the defendant had notice of his mental condition when he procured the release; otherwise, the replication is defective. (*Cooney v. Lincoln*, 799.)

REPLEVIN.

1. REPLEVIN.—THE TITLE TO REAL ESTATE cannot be litigated in an action of replevin. (*Hines v. Good*, 22.)

2. REPLEVIN—TITLE TO LAND—SALE OF HOUSE BY ONE IN ADVERSE POSSESSION.—Where a defendant, who is in the actual possession of land in good faith, claiming title thereto, sells a house thereon which is severed from the land and removed by the vendee, one out of possession cannot, in an action of replevin, secure possession of such house upon the claim that he is the true owner of the land. (*Hines v. Good*, 22.)

3. REPLEVIN—TITLE TO LAND—JUDGMENT-ROLLS AS EVIDENCE.—In an action of replevin for the recovery of a house, judgment-rolls are admissible in evidence where they are not offered for the purpose of establishing title, but solely to show that the defendant claimed title to the land upon which the house was situated, and which are pertinent for that purpose. (*Hines v. Good*, 22.)

4. **REPLEVIN—VERDICT—SUFFICIENCY OF.**—In an action of replevin for the recovery of specified personalty, a verdict for the plaintiff finding that she is the owner of the property sued for, and assessing its value, is sufficient to justify a recital in the judgment thereon that they found that plaintiff was entitled to the possession and return of the property. (Hall v. Law Guarantee etc. Soc., 935.)

5. **REPLEVIN—PLEADING MOTION TO MAKE MORE DEFINITE.**—In an action of replevin to recover various articles of personalty, it is error to refuse to grant defendant's motion that the complaint be made more definite and certain by setting forth the itemized value of each article sought to be replevied. (Hall v. Law Guarantee etc. Soc., 935.)

6. **REPLEVIN—ERRONEOUS JUDGMENT.**—In a simple action of replevin a plain money judgment is erroneous. The judgment in such case should be for the possession of the property, or the value thereof in case a delivery cannot be had, and damages for its detention. (Hall v. Law Guarantee etc. Soc., 935.)

RESCUING LIFE.

See Negligence, 3-7.

RES GESTAE.

See Railroad, 20.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgment, 7-13.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SALE.

1. **SALES—NO ACTION FOR PRICE BEFORE DELIVERY.** Before a seller can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title, and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained. (McCormick etc. Co. v. Balfany, 393.)

2. **SALES—CONSTRUCTIVE DELIVERY—WHAT IS NOT.**—If a person orders a machine of a described kind, to be shipped to him, but there is no appropriation of any particular machine to the buyer, or to his contract, a mere statement of the seller to the buyer, upon receiving a number of like machines, that the latter's machine is ready to be delivered, and pointing to a number on hand, any one of which would comply with the terms of the order, does not amount to a constructive delivery of any particular machine. (McCormick etc. Co. v. Balfany, 393.)

3. **CONTRACT AGAINST PUBLIC POLICY.**—A conditional sale of goods for use in a house of ill-fame, with knowledge on the part of the vendor of the use to which the goods are to be put, is

a contract opposed to public policy and void. (Standard Furniture Co. v. Van Alstine, 960.)

4. **CONDITIONAL SALE—SALE ON INSTALLMENTS—INSTRUMENT IN FORM OF LEASE.**—A written contract in the form of a lease of personal property, by the terms of which payments were to be made in monthly installments, designated rent, the title to remain in the lessor until the final payment was made, at which time a bill of sale was to be given and the transaction closed, is a conditional sale and not a lease. (Lundy Furniture Co. v. White, 41.)

5. **CONDITIONAL SALES—GOODS SENT UNDER MEMORANDUM CONTRACT.**—The custom prevailing among jewelers whereby jewelry is sent by wholesalers to retailers under a "memorandum" contract, to remain the property of the wholesaler, and to be paid for only after sale by the retailer, or if not so sold, to be returned, constitutes a conditional sale, and not a bailment; and an innocent and bona fide purchaser from the retailer is within the protection of a statute providing that all conditional sales of property, where the property is placed in the possession of the vendee, shall be absolute as to all creditors or purchasers in good faith, unless within ten days of the taking of possession by the vendee a memorandum of the condition of the sale, signed by both parties, shall be filed in the auditor's office of the county wherein the vendee resides. (Eisenberg v. Nichols, 917.)

SETOFF.

1. **BANKS AND BANKING—INSOLVENCY—SETOFF.**—If a note given by a depositor to a bank is not due at the time of the latter's insolvency, the former may, upon the maturity of the note, set off the amount of his deposit against it. (Jack v. Klepser, 699.)

2. **PARTNERSHIP—SETOFF.**—A **JOINT CLAIM** may be set off by one of the owners in an action against him for his own proper debt, provided he has the assent of his co-owners; and there are no interests of third persons to be prejudiced, and such assent may be given after action brought. (Jack v. Klepser, 699.)

3. **BANKS AND BANKING—PARTNERSHIP CLAIM—SETOFF.**—If a deposit in a bank at the time of its insolvency belongs to two partners, and one of them assigns his interest to the other, the latter may set off the deposit against a note of another partnership of which he is a member, and which note is held by such bank. (Jack v. Klepser, 699.)

See Corporations, 16.

SEWER.

See Municipal Corporation, 12-16.

SHELLEY'S CASE.

See Estate, 2.

SLEEPING-CAR COMPANY.

See Railroad, 25-28.

SPENDTHRIFT TRUST.

See Trusts, 14-17.

STATUTE.

1. **STATUTES—ADOPTED FROM ANOTHER STATE—CONSTRUCTION.**—If a statute adopted from another state has already received a judicial construction, it is to be presumed that it was adopted in view of such construction. (*In re O'Connor*, 814.)

2. **STATUTES—CONSTRUCTION—RE-ENACTMENT OF ACT REPEALED.**—When a repealing act re-enacts substantially the provisions of the act repealed, the latter is not thereby destroyed, or interrupted in its operation, but remains in full force. (*Florida etc. R. R. Co. v. Foxworth*, 149.)

See Constitutional Law.

STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS—ABBREVIATIONS.**—A contract authorizing the sale of land is sufficient, though abbreviations are used therein, if they are such that anyone familiar with land descriptions and abbreviations used in describing land would have no difficulty in supplying the terms represented by the abbreviations. Especially is this true when there is a diagram attached to the contract, rendering the signification of the abbreviations more obvious. (*Melone v. Ruffino*, 127.)

2. **STATUTE OF FRAUDS—PAROL AGREEMENT FOR ONE YEAR TO BEGIN IN THE FUTURE.**—Under a statute which requires an agreement to be in writing which "by its terms is not to be performed within a year from the making thereof," a parol agreement for a one year lease to commence in the future is invalid, since the statute of frauds applies if the time from the making of an agreement to the end of its performance exceeds a year never so little. (*Wickson v. Monarch Cycle Mfg. Co.*, 36.)

3. **STATUTE OF FRAUDS—CONSTRUCTION OF CONFLICTING SECTIONS—PAROL LEASE.**—Where one section of a statute provides that an agreement shall be in writing which by its terms is not to be performed within a year from the making thereof, and a later section provides that a lease for a longer period than one year shall be in writing, the two sections must be read together, and as so read a parol lease is valid for one year, but must be for no longer than one year from the time it is made. (*Wickson v. Monarch Cycle Mfg. Co.*, 36.)

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STIPULATION.

See Attorney and Client, 2.

STREET ASSESSMENT.

See Constitutional Law, 9.

STREET-CAR TRANSFER.

See Municipal Corporation, 6-8.

STREET RAILWAY.

See Municipal Corporation, 6-8; Railroad, 23, 24.

SUBROGATION.

See Executor and Administrator, 5.

SUMMONS.

See Process.

SURETYSHIP.

See Bond; Guardian and Ward; Officers.

SURVIVORSHIP.

See Action.

TAXATION.

1. **CONSTITUTIONAL LAW—INHERITANCE TAX.**—A constitutional provision requiring equality of taxation as near as may be, applies to inheritance taxes exactly as it does to taxes on property, except as may be otherwise expressly provided in such constitution. (*Drew v. Tift*, 446.)

2. **CONSTITUTIONAL LAW—INHERITANCE TAX.**—A statute which attempts to lay an inheritance tax, excluding from its operation real property and laying the tax upon inheritances of personalty, exempting from its operation persons and corporations whose property is exempt from taxation, allowing a larger exemption to lineal than to collateral heirs, and not taxing the excess of the value of the property received above a uniform exempted sum, is unconstitutional and void under a constitution requiring equality of taxation as near as may be. (*Drew v. Tift*, 446.)

3. **UNCONSTITUTIONAL STATUTE—RECOVERY OF MONIES PAID UNDER.**—If the payment of an assessment is induced by compulsory process and made under protest, it may be recovered back if the statute under which it was made is unconstitutional. The right of recovery is not impaired by the fact that the assessment was added to the general tax due from the plaintiff. (*Dexter v. Boston*, 306.)

TIME.

1. **TIME—COMPUTATION OF WHEN YEARS ARE INVOLVED.**—A statute providing that "the day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning," is not applicable when years are to be computed. (*Aultman etc. Co. v. Syme*, 565.)

2. **IN COMPUTING THE TIME WITHIN WHICH AN EXECUTION MAY ISSUE**, the first day should be counted, unless there is a statute prescribing otherwise. (*Aultman etc. Co. v. Syme*, 565.)

TITLE TO STATUTE.

See Constitutional Law, 1-3.

TRADE NAME.

1. **TRADE NAMES—OBJECT OF LAW—RIGHT TO PROTECTION.**—The law of trade names is designed for the protection of parties entitled to such names, as well as to prevent deception, and to protect the public from imposition. Hence, if persons engage in business, to sell "Armington & Sims Engines," as the "Armington

ton & Sims Company, Successors to Armington & Sims Engine Company," the resemblance is so close as to be misleading and confusing in business matters, and the original company, being still in existence and having assets, has a right to its name, free from simulative interference. (*Armington v. Palmer*, 786.)

2. **TRADE NAMES — SIMULATION — RESTRICTION.** — Although one may make and sell an article unprotected by a trade name, he cannot simulate the name or product of another so as to trench upon the latter's rights or to mislead the public. (*Armington v. Palmer*, 786.)

See Corporation, 10-13; Injunction, 3, 4.

TRADE UNION.

See Labor Union.

, TRANSFER TICKET.

See Municipal Corporation, 6-8.

TRESPASS.

1. **TRESPASS—MINING COAL—SELLING RIGHT ON ANOTHER'S LAND.**—One who knowingly authorizes a company to mine for the coal of a third person, and the company takes it and pays him therefor, is liable as a trespasser, though he did not participate in mining the coal otherwise than by making the contract under which it was dug. (*Donovan v. Consolidated Coal Co.*, 206.)

2. **TRESPASS—VALUE OF PROPERTY INCREASED BY—DAMAGES.**—Although the value of coal may be increased by mining and removing it to the surface by the labor of the wrongdoer, the owner is entitled to its full value in its severed condition, and the trespasser can take no advantage for his labor, notwithstanding such mining was done by mistake or inadvertence. (*Donovan v. Consolidated Coal Co.*, 206.)

TRIAL.

1. **TRIAL—AFFINITY AS A GROUND OF CHALLENGE.**—IF A JUROR is related to either party within the ninth degree, though it is only by marriage, a principal challenge will be admitted. (*State v. Wall*, 195.)

2. **TRIAL—PHYSICAL EXAMINATION—POWER OF COURT TO REQUIRE PARTY TO SUBMIT TO.**—In a civil action for personal injuries, where the plaintiff tenders an issue as to his physical condition and appeals for redress, the court has power, upon proper safeguards to protect the rights of both parties, to order the plaintiff to submit to a physical examination of his person, that the nature and extent of his injuries may be ascertained, and to dismiss his action in case he refuses to submit. It is error for the trial court, in a proper case, to deny the defendant's application, reasonably made, for such an order. (*Wanek v. Winona*, 354.)

3. **TRIAL—NECESSITY FOR FINDINGS.**—If the court withdraws the case from the jury and enters judgment dismissing the action, no findings of fact or conclusions of law are required to be made. (*Fidelity Trust Co. v. Palmer*, 953.)

4. **PRACTICE—FINDINGS, WHEN NOT NECESSARILY CONTRADICTIONARY.**—A finding that the plaintiff was ignorant of the

unsafe condition of a wall, and a finding that he did not have a better opportunity than the defendant for seeing and knowing its condition, are not contradictory. (*Starr v. Kreuzeberger*, 92.)

5. TRIAL — DIRECTIONS FOR VERDICT — WAIVER OF RIGHT TO GO TO JURY.—If defendant excepts to the court's direction to find for plaintiff and to its refusal to direct a verdict in his own favor, without requesting the submission of any specified questions of fact, he thereby submits them to the court; and waives his right to go to the jury thereon. (*Sweetland v. Buell*, 676.)

See Instructions.

TRUST.

1. TRUSTS AND TRUSTEES—DEALINGS WITH TRUST PROPERTY—AGENT OF RECEIVER.—A receiver or other trustee of an express trust cannot permit nor authorize his agent to do with the trust estate what he is not permitted to do himself. He cannot speculate with the trust property to his own advantage and benefit, nor can he authorize or ratify such acts on the part of his agent. (*Gilbert v. Hewetson*, 486.)

2. TRUSTS AND TRUSTEES—DEALINGS IN TRUST PROPERTY.—A receiver, trustee, attorney, agent or any other person occupying fiduciary relations respecting property or persons is utterly disabled from acquiring for his own benefit the property committed to his custody for management. (*Gilbert v. Hewetson*, 486.)

3. TRUSTS—DENIAL OF COMPENSATION TO TRUSTEE, SUCH AS AN ASSIGNEE FOR THE BENEFIT OF CREDITORS.—If a trustee, such as an assignee for the benefit of creditors, has been guilty of fraud, willful default, or gross negligence in the management of the trust estate, compensation for his services will be denied to him whether he claims it under the rule of equity or the statute relating to fees of assignees and their attorneys in insolvency proceedings, for the statute and the equity rule are not inconsistent, and the former does not abrogate the latter. (*Davis v. Swedish-American Nat. Bank*, 400.)

4. TRUSTS—MINGLING OF FUNDS—INTEREST.—If a trustee, such as an assignee for the benefit of creditors, mingles the trust fund with his own money, or uses it in his private business, he will be charged with simple interest at the legal rate, unless he receives or makes more than that, in which case he must pay more. (*Davis v. Swedish-American Nat. Bank*, 400.)

5. TRUSTS AND TRUSTEES—POWER OF SALE—NOTICE.—A trustee exercising a power of sale not prescribing the manner of its execution must give definite notice as to the time, place, and terms of sale, the authority under which it is to be made, and the property to be sold must be described with sufficient particularity to identify it and to invite competition. (*Laclede Nat. Bank v. Richardson*, 528.)

6. TRUSTEES — SALES — INADEQUACY OF PRICE — ADJOURNMENT.—A trustee, in exercising the discretion with which he is charged in executing a power of sale vested in him, should adjourn the sale if only a few bidders are present, the weather is inclement, and the sum offered grossly inadequate to the value of the property, unless there is an express prohibition in the instrument creating the power against such adjournment of the sale. A failure under such circumstances to adjourn the sale is ground for setting it aside. (*Laclede Nat. Bank v. Richardson*, 528.)

7. **PRECATORY TRUSTS.**—A will by which a testator directed his wife, whom he nominated as executrix and made residuary devisee, to use so much of his residuary estate for the support and benefit of his niece as the wife should, from time to time, think best in her discretion to do, and also created a trust fund, the income of which was to be paid to his wife during life, and at her death one thousand dollars per annum of the income were to be paid to such niece until she married, or if she never married, then during her life, creates a trust in favor of the niece during the life of the wife, which a court of equity will enforce against the latter by requiring her to honestly and intelligently exercise the discretion vested in her. (*Collister v. Fassitt*, 586.)

8. **PRECATORY TRUSTS—POWER OF COURT TO CONTROL.**—Where by a will a wife is required to pay a niece of the testator out of the residuary estate bequeathed the former so much as she shall, from time to time, think best for the support and benefit of the niece, a court may ascertain the amount and decree the payment of a reasonable sum for the support of such niece, where the wife fails to honestly and fairly exercise her discretion. (*Collister v. Fassitt*, 586.)

9. **TRUSTS—RESULTING—PAYMENT OF CONSIDERATION.** As between strangers, a resulting trust arises where the purchase money is paid by one person and the title to the property is taken in the name of another. (*Dorman v. Dorman*, 210.)

10. **TRUSTS—CONSIDERATION PAID BY HUSBAND—ADVANCEMENT.**—Where the purchase price of real property is paid by a husband, and the legal title is taken in the name of his wife, a resulting trust does not ordinarily arise, the presumption being that the conveyance was intended as an advancement; but such presumption may be rebutted by clear and satisfactory evidence. (*Dorman v. Dorman*, 210.)

11. **TRUST—PROPERTY TAKEN IN WIFE'S NAME—ADVANCEMENT—EVIDENCE TO REBUT.**—If a husband purchases land in his wife's name, the presumption of an advancement is sufficiently rebutted by facts which show that he took possession of the land, improved it, paid the taxes thereon, and occupied it with his wife as a homestead; that such property constituted the bulk of his estate, and the wife admitted that she held the property in trust for him. (*Dorman v. Dorman*, 210.)

12. **TRUST—RESULTING.—LACHES** cannot be imputed to one who seeks to enforce a resulting trust in real property, where his right to use and possess the same has never been questioned, since his possession is notice to the world of all his rights. (*Dorman v. Dorman*, 210.)

13. **TRUST—ENFORCING—PLEADING DEFENSES.**—In equity a defendant is bound to apprise the complainant of the nature of his defense, and cannot avail himself of matters of defense appearing from the evidence but not set up in the answer. Hence where a husband seeks to enforce a resulting trust in land taken in the name of his wife, the question whether the title was so taken to defraud his creditors cannot be considered unless the answer contained such allegations. (*Dorman v. Dorman*, 210.)

14. **SPENDTHRIFT TRUSTS.**—Where, under a trust, the income of property is given to a legatee for life with a direction that "no income or principal shall in any case be assignable or alienable by anticipation or subject to attachment, levy, or seizure by any creditor of the beneficiary, prior to his actual receipt thereof, a trustee in bankruptcy of such beneficiary is not entitled to have any part of such income paid to him by the trustee. (*Munroe v. Dewey*, 304.)

15. WILLS—SPENDTHRIFT TRUSTS—MEANING OF “SUPPORT.”—A gift for the “support” of a son contained in a spendthrift clause of a will means a gift for his personal or physical subsistence or maintenance. (Winthrop Co. v. Clinton, 729.)

16. WILLS—SPENDTHRIFT TRUSTS.—It is not essential that a spendthrift trust contained in a will should contain words providing specifically that the income shall not be subject to the debts or liabilities of the cestui que trust. (Winthrop Co. v. Clinton, 729.)

17. WILLS—SPENDTHRIFT TRUSTS.—A gift by a testator of his estate to his executors to pay the net income to his son “for his use and support for and during all the term of his natural life, and not to be liable to anticipation, and his receipt alone to be the sole discharge” to the trustees, with a gift over after the son’s death, creates a spendthrift trust in favor of the son, free from the claims of his creditors. (Winthrop Co. v. Clinton, 729.)

See Monopoly; Receiver, 4; Will, 6, 7.

USAGE.

See Custom.

VENDOR AND VENDEE.

See Statute of Frauds, 1.

VERDICT.

See Trial, 8.

WAGES.

1. WAGES—FRAUDULENT ASSIGNMENT OF.—A debtor cannot place his earnings beyond the reach of attachment and at the same time receive a portion thereof for his own use. (Robinson v. McKenna, 793.)

2. WAGES—ASSIGNMENT OF—VALIDITY AS TO CREDITORS.—An assignment of wages to secure a present indebtedness, and also to secure the assignee for future advances of goods and merchandise, is valid and binding up to the amount of the debt secured, and of the goods actually furnished at the time of an attachment by trustee process; but if it goes beyond this, and includes money paid over to the assignor out of his own earnings, the assignment is fraudulent as to creditors, and the assignor’s employer may be charged as garnishee. (Robinson v. McKenna, 793.)

3. ASSIGNMENT OF WAGES TO BECOME due, indefinite as to amount, unlimited as to time, without acceptance by the employer, and without notice to an attaching creditor, is void as to the latter. (Steinbach v. Brant, 494.)

WARRANT.

See Negotiable Instruments.

WATERS AND WATERCOURSES.

1. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—The title of a riparian owner on a navigable stream extends only to low-water mark, and not to the middle of the stream. (Moore v. Farmer, 504.)

2. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—ISLANDS AND ACCRETIONS.—A riparian owner on the bank of a navigable stream is not, by reason thereof, the owner of an island that springs up in the stream; and if, by accretion to such island, its water margin line unites with the main shore, the new made land becomes part of the island and not of the main land, and the riparian ownership is not thereby extended. (*Moore v. Farmer*, 504.)

3. WATER AND WATERCOURSES—RIPARIAN RIGHTS.—A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to the reasonable use of it as it passes by his land, and as all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of others, and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law, *Aqua currit et debet currere, ut currere solebat*, still maintains. (*Strobel v. Kerr Salt Co.*, 643.)

4. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—Consumption of the waters of a natural stream by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by a reasonable use. (*Strobel v. Kerr Salt Co.*, 643.)

5. WATER AND WATERCOURSES—RIPARIAN RIGHTS—REASONABLE USE.—Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which, under certain circumstances, is held reasonable, under different circumstances is held to be unreasonable. It is also material sometimes, to ascertain which party first erected his works and began to appropriate the water. (*Strobel v. Kerr Salt Co.*, 643.)

6. WATER AND WATERCOURSES—RIPARIAN RIGHTS—REASONABLE USE—QUESTION OF FACT.—The question of reasonable use of the waters of a natural stream is generally one of fact, but whether the undisputed facts and the necessary inference therefrom establish a reasonable use is a question of law. (*Strobel v. Kerr Salt Co.*, 643.)

7. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—NEW USE—POLLUTION.—If the diversion or pollution of the waters of a stream is caused by a new and extraordinary method of using the water hitherto unknown in the state, and such method not only permanently diverts a large quantity of water, but also renders the remainder so salt at times that cattle will not drink it unless forced to by necessity, fish are destroyed in great numbers, vegetation is killed, and machinery rusted, such use as a matter

of law is unreasonable, and entitles the lower riparian owner to relief. (*Strobel v. Kerr Salt Co.*, 643.)

8. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—UNREASONABLE USE—INJUNCTION.—If the natural and necessary result of the place selected and the method adopted by an upper riparian owner in the use of the water of a stream in the conduct of his business is to cause material injury to the property of the owner below, a court of equity may restrain such use on account of the inadequacy of the remedy at law, and in order to prevent a multiplicity of suits. The lower riparian owners are entitled to a fair participation in the use of the water and their rights cannot be cut down by the convenience or necessity of an upper owner's business. (*Strobel v. Kerr Salt Co.*, 643.)

9. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—NEW USE—UNREASONABLE USE—POLLUTION.—Courts will not permit substantial injury to neighboring property with a small but long-established business on a natural stream, for the purpose of enabling a new and great industry thereon to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the rule that every man must so use his own property as not to injure that of his neighbor, the fact that he has invested much money and employs many men in carrying on a lawful and useful business on his own land does not change the rule, nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower proprietor, or to so pollute the stream as to render it unfit for ordinary use. (*Strobel v. Kerr Salt Co.*, 643.)

10. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—POLLUTION OF STREAM—INJUNCTION.—If one riparian owner by his use pollutes the water of a natural stream, the fact that others are using it in the same manner, instead of preventing relief may require it, and, even if the damages are slight, if the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity may interfere by injunction. (*Strobel v. Kerr Salt Co.*, 643.)

11. WATERS AND WATERCOURSES—RIPARIAN RIGHTS—INJURY COMMON TO CO-OWNERS.—Separate owners of distinct parcels of land upon a stream have a common grievance against a person for an injury to the stream of the same kind, inflicted at the same time and by the same acts, and such common injury, though differing in degree as to each owner, makes a common interest, and warrants a common remedy. (*Strobel v. Kerr Salt Co.*, 643.)

12. WATER AND WATERCOURSES—INJUNCTION AGAINST UNREASONABLE USE.—A court of equity may require, as a condition of withholding an injunction against an upper riparian owner from diverting or polluting the water of a stream by an entirely new use thereof, the construction of a reservoir on the upper sources of the stream, to accumulate water when it is plentiful for use in times of scarcity, and thus neutralize the diminution caused by the new use, and the court may also require, on like condition, greater care in preventing the escape of foreign substances into the stream, and thus prevent or minimize the pollution thereof. (*Strobel v. Kerr Salt Co.*, 643.)

13. WATERS AND WATERCOURSES—DIVERSION OF SUB-SURFACE WATER.—A municipal corporation or individual who by means of wells and pumps on his own land taps the subsur-

face water stored in the land of an adjoining owner, and in all of the region thereabout, and leads it to his own land and by merchandising it prevents its return, to the injury of such adjacent land, is guilty of a trespass, and liable therefor in damages. (*Forbell v. New York*, 666.)

WILL.

1. **WILLS—EXECUTION—ATTESTATION OF.**—If the witnesses sign in the presence of the testator, who signs immediately afterward in their presence, the whole transaction being as completely one as it can be in the order of events, the will is not properly executed, and cannot be admitted to probate. (*Marshall v. Mason*, 305.)

2. **WILLS—EXECUTION OF.**—A WILL IS SIGNED IN THE PRESENCE OF THE TESTATOR, in legal contemplation, when it is signed by the witness at a table in one room, while the testator is in bed in an adjoining room, where the table is directly in front of the door, so that the testator can see the witness sign if he looks, and the witness can also see the testator. (*Hopkins v. Wheeler*, 819.)

3. **WILLS—MENTAL CAPACITY—NONEXPERT WITNESSES—INADMISSIBLE OPINIONS OF.**—It is not admissible, on the trial of an issue as to the mental capacity of a testator, to ask a nonexpert witness on the subject of mental capacity whether the testator was in a condition to make a will, as the question calls for the opinion of the witness as to the degree of mental capacity required by law for the making of a will. (*Hopkins v. Wheeler*, 819.)

4. **WILLS—MENTAL CAPACITY—NONEXPERT WITNESSES—ADMISSIBLE OPINIONS OF.**—Nonexpert witnesses, on the trial of an issue as to the mental capacity of a testator, should be permitted to testify to facts which they have observed bearing on the mental condition of the testator, and then to give their opinions as to his mental condition derived from those facts. (*Hopkins v. Wheeler*, 819.)

5. **WILLS—CONSTRUCTION—INTENTIONAL OMISSION OF CHILD—HOW SHOWN.**—When a testator omits to provide in his will for any of his children, or for the issue of a deceased child, and the statute provides that they shall take the same share of his estate that they would have been entitled to if he had died intestate, "unless it appears that the omission was intentional and not occasioned by accident or mistake," an intentional omission need not appear in the will, but may be shown by extraneous evidence. (*In re O'Connor*, 814.)

6. **WILLS—CONSTRUCTION—TRUSTS.**—A will devising "all the rest and residue of my estate, both real and personal, to my wife, for and during her lifetime, to support herself and my children and to educate" them, creates a trust estate in life for the wife for the benefit of such children, but without power to sell the trust estate. (*Hunter v. Hunter*, 845.)

7. **WILLS—TRUSTS—REMAINDERMEN.**—If a life estate is given by will to a person without power of sale and burdened with a trust for the support of the trustee and the children of the testator, and the trustee violates the trust by selling the land, the children may maintain an action against the trustee and the purchaser to preserve their rights in the trust estate. (*Hunter v. Hunter*, 845.)

8. **WILLS—DEVISE TO A CLASS.—A DEVISE** to the legal and direct descendants, "the heirs of their bodies begotten and their heirs," is limited to the "heirs of the bodies" of the ancestors named, and only those of that class who are living at the testator's death will take. (*Lancaster v. Lancaster*, 234.)

9. **WILLS—DEVISE TO A CLASS—WHEN TAKES EFFECT.** When there is a simple devise to a class, and the will neither expressly nor by necessary implication fixes a time when the devisees are to be ascertained or when the division is to be made, the law will fix such time at the testator's death, that being the time when the will first speaks. (*Lancaster v. Lancaster*, 234.)

10. **WILLS—DEVISE TO A CLASS—WHO TAKE.**—When a devise is to a class, the death of one member of the class before the testator will not cause a lapse of any part of the gift, but those of the described class who survive the testator will take the whole. (*Lancaster v. Lancaster*, 234.)

11. **WILLS—DEVISE OF LIFE ESTATE WITH REMAINDER.** A will devising a life estate to one, with a remainder "to heirs of her body begotten, after her death," gives the first devisee a life estate, and upon her death the "heirs of her body" living at the death of the testator will take, not as her heirs generally, but by virtue of the original gift to them as a class, to be ascertained when the will should take effect. (*Lancaster v. Lancaster*, 234.)

12. **WILLS—JURISDICTION TO DETERMINE QUESTIONS ARISING UNDER—WHEN RESTRICTED TO THE PROBATE COURT.**—Where none of the questions arising under a will respecting which the administrator entertains doubt relate to the administration of the estate, but solely to what distribution should be made of it after administration, a court of equity has no jurisdiction to consider and determine such questions, but they must all be disposed of by the decree of distribution to be entered by the court having jurisdiction of the estate. (*Toland v. Earl*, 100.)

13. **EQUITY WILL NOT ENTERTAIN JURISDICTION TO CONSTRUE A WILL** except as an incident to its jurisdiction over trusts, and, therefore, never undertakes to interpret a will which only deals with, and disposes of, purely legal estates and interests, and makes no attempt to create any trust relation with respect to the property devised or bequeathed. (*Toland v. Earl*, 100.)

14. **EQUITY—JURISDICTION OF, TO CONSTRUE WILLS.**—Where the law has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate, through which every purpose for which resort was formerly had to courts of equity is attained, and the deraignment of title to the property of deceased persons is through a decree of distribution entered as the final act in such administration, and jurisdiction over such proceeding is vested in the same court having jurisdiction of cases in equity, no independent suit can be brought for the interpretation of the will. (*Toland v. Earl*, 100.)

WITNESS.

1. **EXPERT TESTIMONY IS ADMISSIBLE** (1) in those cases in which the conclusions to be drawn by the jury depend upon the existence of facts not of common knowledge, and peculiarly within the knowledge of men whose experience or study enables them to speak with authority on the subject; and (2) in those cases in which the conclusions to be drawn from the facts stated, as well as the knowledge of the facts themselves, depend upon professional or

scientific knowledge or skill not within the reach of ordinary training or intelligence. In cases of the latter class both the facts and the conclusions to which they lead may be testified to by qualified experts. (*Dougherty v. Milliken*, 608.)

2. **EXPERT TESTIMONY—IMPROPER ADMISSION OF.**—It is not proper to receive expert testimony as to whether a witness regarded an eyebolt as sufficient to sustain two derricks attached thereto, where the sufficiency of the derricks and of each of their parts depends upon certain facts which a witness skilled in their construction could easily have described to the jury, and the jury with these facts before them would have been competent to form a conclusion. (*Dougherty v. Milliken*, 608.)

3. **WITNESSES—CROSS-EXAMINATION.**—The right to cross-examine a witness after he has been sworn is not destroyed by a failure to examine him in chief. (*Mason v. Southern Ry. Co.*, 826.)

See Evidence; Will, 2-4.

WRONGFUL DEATH.

See Death of Human Being.

YEAR.

See Time, 1.

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